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NO. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HERMAN S. SOLEM, WARDEN,
SOUTH DAKOTA STATE PENITENTIARY; and
MARK V. MEIERHENRY, ATTORNEY GENERAL,
STATE OF SOUTH DAKOTA,

Petitioners,

v.

JOHN BARTLETT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether the opening of land within the original Cheyenne River Reservation to settlement by non-Indians through the Act of May 29, 1908, 35 Stat. 460, diminished the original reservation so as to confer criminal jurisdiction within the opened area upon the State of South Dakota?

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Solem and Meierhenry and Respondent Bartlett have been the parties to this action in both the District Court and the Court of Appeals. The Petitioners represent the State of South Dakota, and will hereinafter be referred to as "State." Respondent Bartlett will be referred to as "Bartlett." In addition to the above-named parties to the action, the following groups have a particular interest in the resolution of the question presented in this Petition:

a. Dewey, Corson and Ziebach Counties, South Dakota, and Sioux County, North Dakota;

b. Cheyenne River Sioux Tribe and Standing Rock Sioux Tribe; and

c. United States of America.

All of these groups were involved in the proceedings in the Court of Appeals as amicus curiae.

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OPINIONS BELOW

The decision of the United States District Court for the District of South Dakota is unreported. That decision, dated April 19, 1982, appears in the Appendix (Appendix A, pp. A1-A8). The District Court's Order dated April 19, 1982, appears in the Appendix (Appendix M, pp. A96-A97). The opinion of the United States Court of Appeals for the Eighth Circuit is reported at the following citation: Bartlett v. Solem, 691 F.2d 420 (8th Cir. 1982) (en banc). The opinion of the Court of Appeals also appears in the Appendix (Appendix B, pp. A9-A12). The Judgment of the Court of Appeals, dated October 27, 1982, appears in the Appendix (Appendix N, pp. A98-A99).

NO. 82-

IN THE

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OCTOBER TERM, 1982

HERMAN S. SOLEM, WARDEN,
SOUTH DAKOTA STATE PENITENTIARY; and
MARK V. MEIERHENRY, ATTORNEY GENERAL,
STATE OF SOUTH DAKOTA,

Petitioners,

v.

JOHN BARTLETT,

Respondent.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on October 27, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The term "Indian Country" is defined in 18 U.S.C. § 1151. That section is set forth in the Appendix (Appendix C, p. A13).

The western portion of the original Cheyenne River Reservation was opened to settlement by non-Indians by the Act of May 29, 1908, 35 Stat. 460. Hereinafter the Act of May 29, 1908, will be referred to as "1908 Act." The 1908 Act is set forth in the Appendix (Appendix D, pp. A14-A29). The 1908 Act was amended by the Act of February 17, 1910, 36 Stat. 196. The Act of February 17, 1910, is set forth in the Appendix (Appendix L, pp. A92-A95).

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

On April 24, 1979, Bartlett pleaded guilty to attempted rape in a South Dakota state court in Dewey County, South Dakota. Bartlett is an enrolled member of the Cheyenne River Sioux Tribe. The crime took place in Eagle Butte,

Dewey County, South Dakota. The exact location of the crime is as follows: Lot 12, Block 16 of the Milwaukee Land Company's First Addition to the town now City of Eagle Butte, South Dakota, located in the NW 1/4, SW 1/4 of Section 17, Township 12 North, Range 24 East of the Black Hills Meridian, Dewey County, South Dakota. This land was patented to T.C. Sherman on November 17, 1910, by the United States government and now is non-trust property owned by Vernon Anderson, a non-Indian. This land is within the confines of the original Cheyenne River Reservation created by the Act of March 2, 1889, 25 Stat. 888. It is also within the portion of the Cheyenne River Reservation opened to settlement by the 1908 Act.

A map illustrating the portions of Corson, Dewey and Ziebach Counties, South Dakota, which were opened to settlement by the 1908 Act appears in the Appendix (Appendix E, p. A30).

B. PROCEDURAL HISTORY

On February 9, 1982, Bartlett filed a petition for a Writ of Habeas Corpus in United States District Court for the District of South Dakota. Bartlett's petition appears in the Appendix (Appendix G, pp. A32-A42).

In his petition, Bartlett claimed that his plea of guilty in state court to an attempted rape charge was invalid because he committed the crime in "Indian Country," as that term is defined in 18 U.S.C. § 1151. According to Bartlett, because the crime was committed in Indian Country, the state court system had no jurisdiction over him or the crime he committed. The United States District Court for the District of South Dakota considered the matter on the written record. The District Court's Memorandum Opinion, dated April 19, 1982, granted Bartlett's petition, concluded that the 1908 Act did not diminish the Cheyenne River Reservation and that the state

lacked criminal jurisdiction over the location of the crime committed by Bartlett.[1]

Bartlett's original action in the United States District Court for the District of South Dakota was brought under the provisions of 28 U.S.C. § 2254. The District Court had jurisdiction under the provisions of 28 U.S.C. § 2254. Notice of Appeal to the United States Court of Appeals for the Eighth Circuit was filed on May 11, 1982. The Notice of Appeal was filed within the thirty (30) days allowed by Rule 4(a)(1) of the Federal Rules of Appellate Procedure.

On June 30, 1982, The State filed a Petition Suggesting Hearing En Banc before the Court of

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[1] The process of redrawing the boundaries of an Indian reservation which has been opened to settlement has been described as "termination," "diminishment," and "disestablishment." These terms are interchangeable. See, United States v. Dupris, 612 F.2d 319, 320 n. 3 (8th Cir. 1979); South Dakota v. Janis, 317 N.W.2d 133, 134 n. 1 (S.D. 1982). Throughout this Petition, the process will be referred to as "diminishment."

Appeals. On July 30, 1982, the petition was granted. An en banc argument before the Court of Appeals was held on September 15, 1982, in St. Paul, Minnesota. The decision by the Court of Appeals, dated October 27, 1982, affirmed the decision of the District Court. The Court of Appeals had jurisdiction of the appeal under the provisions of 28 U.S.C. § 1291.

I

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH A STATE COURT OF LAST RESORT.

Since 1973, the South Dakota Supreme Court has twice ruled on the question presented in this Petition.[2] Stankey v. Waddell, 256 N.W.2d 117

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[2] The South Dakota Supreme Court is the court of the last resort in the State of South Dakota. The question presented in this Petition involves the interpretation of an Act of Congress, which makes the question presented to this Court a federal question.

(S.D. 1977); South Dakota v. Janis, 317 N.W.2d 133 (S.D. 1982). In both of these decisions, the court found that the area of the Cheyenne River Reservation opened to settlement by the 1908 Act was no longer part of the Cheyenne River Reservation, and that the State of South Dakota has jurisdiction in that area.[3]

By contrast, the most recent decisions of the United States Court of Appeals for the Eighth Circuit, including the present action, have concluded that the area opened to settlement is still part of the original Cheyenne River Reservation. United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973) [hereinafter referred to

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[3] The 1908 Act opened not only a portion of the Cheyenne River Reservation to settlement by non-Indians, but also a portion of the Standing Rock Reservation. That reservation is located in Corson County, South Dakota and Sioux County, North Dakota. Because of the location of the offense committed by Bartlett, the jurisdictional status of the Standing Rock Reservation is not directly at question in this action.

as "Erickson"]; United States v. A Juvenile, 453 F.Supp. 1171 (D.S.D. 1979), rev'd sub nom., United States v. Dupris, 612 F.2d 319 (8th Cir. 1979); vacated and remanded, 446 U.S. 980 (1980).

Because the decisions of the South Dakota Supreme Court and the United States Court of Appeals for the Eighth Circuit are in direct conflict on the same issue of law, this Court

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The United States Court of Appeals for the Eighth Circuit has decided that Congress did not intend to diminish the eastern portion of the Standing Rock Reservation, which was opened to settlement by the Act of February 14, 1913, 37 Stat. 675. United States v. Long Elk, 565 F.2d 1032 (8th Cir. 1977). The jurisdictional status of the eastern portion of Standing Rock Reservation is also not at question in this action.

The State also acknowledges that the federal and tribal governments have exclusive jurisdiction over Indian activities on those portions of the original reservation which were restored to reservation status pursuant to 25 U.S.C. § 467, and on Indian allotments presently held in trust. 18 U.S.C. § 1151. Further, the State does not question the continued extension of federal services to tribal members residing within the area in question. See, Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 615-616 n. 48 (1977)

should grant the State's Petition in order to review the question presented herein.[4]

II

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The question presented in this Petition involves the jurisdictional status of the lands within the Cheyenne River Reservation which

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[4] This Court's decision in DeCoteau v. District County Court, 420 U.S. 425 (1975), presented a procedural situation similar to that found in this Petition. A conflict existed between the South Dakota Supreme Court and the United States Court of Appeals for the Eighth Circuit concerning the interpretation of an Act of Congress, Act of March 3, 1891, 26 Stat. 989, which opened reservation land in South Dakota to settlement by non-Indians. In DeCoteau v. District County Court, 87 S.D. 555, 211 N.W.2d 843 (1973), the South Dakota Supreme Court held that the opening of the land to settlement in 1891 diminished the Lake Traverse Reservation. The Court of Appeals came to the opposite conclusion in United States ex rel. Feather v. Erickson, 489 F.2d 99 (8th Cir. 1973). This Court granted certiorari to resolve the conflict. This Court affirmed the South Dakota Supreme Court's decision. DeCoteau, 420 U.S. at 449.

were opened to settlement by the 1908 Act.[5] This Court has already faced the question of whether an Act of Congress was intended to diminish other Sioux Indian Reservations in South Dakota.

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[5] The 1908 Act is part of a series of acts of Congress which opened Indian reservation land to settlement by non-Indians. The Acts within this series are often referred to as Surplus Lands Act. In addition to the 1908 Act, which opened the Cheyenne River and Standing Rock Reservations to settlement, several other Acts opened the other Sioux Indian Reservations in South Dakota to settlement by non-Indians. These Surplus Lands Acts are specific acts which effectuated the general policy guidelines set forth in the General Allotment Act of 1887, 24 Stat. 388, commonly referred to as the Dawes Act. Portions of both the Rosebud and Pine Ridge Reservations in South Dakota were opened to settlement by specific Surplus Lands Acts. The Rosebud Reservation was opened by the following series of acts: Act of April 23, 1904, 33 Stat. 254; Act of March 2, 1907, 34 Stat. 1240; and Act of May 30, 1910, 36 Stat. 448. The Pine Ridge Reservation was opened by the Act of May 27, 1910, 36 Stat. 440. These acts appear in the Appendix as follows: Act of April 23, 1904, Appendix H, pp. A43-A53; Act of March 2, 1907, Appendix I, pp. A54-A63; Act of May 30, 1910, Appendix J, pp. A64-A77; and Act of May 27, 1910, Appendix K, pp. A78-A91.

DeCoteau v. District County Court, 420 U.S. 425 (1975); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); United States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977).

The importance of any diminishment decision is clear. A certain area must either lie within the jurisdiction of the state courts or within the jurisdiction of the federal courts. The determination is important to the general public and essential for law enforcement personnel.

A review of the legal history of the area in question illustrates the need for a decision by this Court on the diminishment issue presented in this Petition. In Erickson, the Court of Appeals reversed a legal determination that existed for over sixty years. That determination, originally set forth in United States v. LaPlant, 200 F. 92 (D.S.D. 1911), stated that South Dakota's state courts had criminal jurisdiction within the area of

the Cheyenne River Reservation opened to settlement by the 1908 Act. One of the later federal court decisions which implicitly approved the existence of this state court jurisdiction was United States ex rel. Miner v. Erickson, 428 F.2d 623 (8th Cir. 1970). In that decision, the United States Court of Appeals for the Eighth Circuit, through Circuit Judge Blackmun, refused to grant habeas corpus relief to a prisoner convicted in a South Dakota state court for a crime committed in Eagle Butte, South Dakota, which is also the site of the crime committed by Bartlett.

Since the Erickson decision in 1973, several other decisions dealing with the same opened area of the same Reservation have been announced by both state and federal courts. United States v. Dupris, supra; South Dakota v. Janis, supra; and Stankey v. Waddell, supra. The existence of these conflicting federal and state court decisions highlights the need for a decision by this Court.

Until a decision is rendered by this Court, the question presented in this Petition will continue to be raised in the state and lower federal courts. Without a decision by this Court there will be no final resolution of the question, thereby continuing the jurisdictional quagmire that presently exists within the original boundaries of the Cheyenne River Reservation.

Several recent cases have presented diminishment questions to this Court. See, State v. Clark, 282 N.W.2d 902 (Minn. 1979), cert. denied, 445 U.S. 904 (1980); Red Lake Band of Chippewa Indians v. State of Minnesota, 614 F.2d 1161 (8th Cir. 1980), cert. denied, 449 U.S. 905 (1981) (Blackmun, J., dissenting); Russ v. Wilkins, 410 F.Supp. 579 (N.D. Cal. 1976), rev'd, 624 F.2d 914 (9th Cir. 1980), cert. denied, 451 U.S. 908 (1981); and Polson v. Confederated Salish and Kootenai Tribes, 665 F.2d 951 (9th Cir. 1982), cert. denied, ___ U.S. ___, 51 U.S.L.W. 3330 (November 2, 1982).

In each one of these cases, certiorari was denied. However, several factors differentiate the matter presented in this Petition from the above-cited cases. Most importantly, none of these other decisions present a direct conflict between a state court and a federal court such as is presented in this matter. Additionally, in this action, the State is seeking to reassert state criminal jurisdiction over the land opened to settlement by one of the Surplus Lands Acts passed by Congress in the early 1900's.

Because of the conflict between the state and the federal courts on the issue of jurisdiction within the opened portion of the Cheyenne River Reservation, the practical problems involved in providing effective law enforcement in this area are great. Both the state and federal governments have a very strong interest in knowing whether prisoners in their respective prisons are properly incarcerated. Under the present situation involving the conflict between the state and

federal courts over jurisdiction on the original Cheyenne River Reservation, prisoners are being set free on technicalities involving merely jurisdictional grounds. Until a final determination is made, these law enforcement problems will continue to exist. The question presented in this Petition is one of exceptional importance to the State of South Dakota, the affected counties, the Cheyenne River and Standing Rock Sioux Tribes, and the general public living within the area in question. The jurisdictional question presented herein should be heard and decided by this Court.

III

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

Recently, the South Dakota Supreme Court reviewed the development of the decisions of this Court in the diminishment area. After studying

recent diminishment decisions of this Court -- Seymour v. Superintendent, 386 U.S. 351 (1962); Puyallup Tribe v. Department of Game of the State of Washington, 433 U.S. 165 (1977); Mattz v. Arnett, 412 U.S. 481 (1972); and Rosebud Sioux Tribe v. Kneip, supra--the court reached the following conclusion:

> A comparison of these four cases reveals that; (1) opening a reservation alone does not diminish its boundaries, but, does create an inherent ambiguity regarding jurisdiction over opened lands, (2) ambiguity is resolved by a searching inquiry into the legislative intent evidenced in the Act itself, its legislative history, the historical and surrounding circumstances of its promulgation, and jurisdictional treatment of the area, and (3) an equivocal legislative intent preponderates against termination.

South Dakota v. Janis, supra at 136-137. The Court of Appeals' decision in this action fails to take the factors delineated in these decisions into account.

The decisions of both the District Court and the Court of Appeals rely on the Court of Appeals'

earlier decisions in Erickson, supra and Dupris, supra. The heaviest reliance is placed on Erickson.[6] Erickson, however, was decided prior to this Court's decisions in Rosebud Sioux Tribe, supra; DeCoteau, supra; and Puyallup Tribe, supra. Therefore the Court of Appeals' reliance upon Erickson is questionable. By relying on Erickson, the Court of Appeals failed to fully examine the factors set forth in the recent decisions of this Court dealing with the diminishment question.

Without fully arguing the merits of this action, the State cites several examples to illustrate the inconsistencies between Erickson and the applicable decisions of this Court:

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[6] Any reliance by the Court of Appeals on their Dupris decision as binding precedent is misplaced. This Court summarily granted certiorari, vacated their judgment and remanded it on mootness. Dupris v. United States, 446 U.S. 980 (1980). This action stripped the Court of Appeals' decision in Dupris of its precedential weight. See, South Dakota v. Janis, supra at 137-138; County of Los Angeles v. Davis, 440 U.S. 625, 634 n. 6 (1979).

A. Language in section 2 of the 1908 Act specifically describes the land not opened to settlement as the "reservation thus diminished." Appendix D, A17-A19. Compare, Appendix J, p. A65 (language in 1910 Rosebud Act describing the land not opened to non-Indian settlement as "the diminished reservation"); and Appendix K, p. A79 (language in 1910 Pine Ridge Act describing the land not opened to non-Indian settlement as "the diminished reservation"). This language is evidence of an intent to diminish the reservation. See, DeCoteau, 420 U.S. at 446-447; Rosebud Sioux Tribe v. Kneip, 521 F.2d 87, 99 (8th Cir. 1975); and United States ex rel. Cook v. Parkinson, supra, at 123. Language in section 9 of the 1908 Act explicitly returns the opened lands in the

Cheyenne River Reservation to the public domain. Appendix D, pp. A27-29. The Erickson court rejected this language.

B. Section 7 of the 1908 Act reserves sections 16 and 36 of each township in the opened area, and grants them to the states in which they are located "for the use of common schools." Appendix D, pp. A25-26. This Court reviewed similar language in the acts opening the Rosebud Reservation in Rosebud Sioux Tribe v. Kneip, supra. Appendix J, pp. A74-A75. After such review, this Court concluded that such language is strong evidence of diminishment. Rosebud Sioux Tribe, 430 U.S. at 599-601. The Erickson court erroneously minimized the importance of this language.

C. The Act of February 17, 1910, 36 Stat. 196, amended section 8 of the 1908 Act. These amendments prohibited the introduction of intoxicating beverages into the area opened by the 1908 Act. Appendix L, pp. A94-95. Identical provisions are found in the acts which opened the Rosebud Reservation to settlement. Appendix J, p. A76. This Court found these provisions to be an expression of intent to diminish the original reservation. Rosebud Sioux Tribe, 430 U.S. at 613-615. The Erickson court found this evidence to be without merit.

D. In the time between the federal court decisions in LaPlant, supra, and Erickson, both the federal and state courts consistently determined that the opened portion of the original reserva-

tion was within the jurisdiction of the State of South Dakota. The State of South Dakota had exercised this jurisdiction, yet the Court of Appeals did not find this exercise useful in the resolution of the question presented.

E. The reports of Inspector James McLaughlin, who dealt with the Cheyenne River and Standing Rock Sioux Tribes in regard to the opening of the lands by the 1908 Act, illustrate the contemporaneous interpretation of the words of the 1908 Act, as they were understood by the parties to the negotiations. See, Stankey v. Waddell, supra at 122-126; South Dakota v. Janis, supra at 137; United States v. A Juvenile, supra at 1176-1188; United States v. Dupris, supra at 329-331 (McMillian, J., dissenting). The Court

of Appeals in Erickson used this material sparingly.

F. The Erickson court ignored the historical context surrounding the passage of the 1908 Act. A comparison of the language and legislative history of the 1908 Act with that of the acts which opened both the Rosebud and Pine Ridge Reservations, reveals that there are no significant differences in the statutes. In addition to the similarities in the language contained within these acts, the sponsors of the acts in Congress were the same. See, Dupris, supra at 326 n. 4 (McMillian, J., dissenting). Moreover, Inspector McLaughlin, in addition to dealing with the Cheyenne River and Standing Rock Sioux Tribes, also dealt with the Indians on both the Rosebud Reservation and the Pine Ridge Reservation

prior to the opening of those reservations to settlement by non-Indians. See, Dupris, supra at 326 n. 5 (McMillian, J., dissenting). See also, Appendix F, p. A31, which is a map of the State of South Dakota illustrating the status of the reservations in the State opened to non-Indian settlement in the late 1800's and early 1900's, including those reservations in western South Dakota where I spector McLaughlin was involved in negotiations with the respective tribes. These similarities are a strong indication of the identity of purpose among the acts. The decisions of this Court note the similarities between the acts opening reservations to settlement, and recognize that these similarities are evidence of diminishment. See, Rosebud Sioux Tribe, 430 U.S. at 608-609, 612-613; DeCoteau,

420 U.S. at 446. See also, United States ex rel. Cook v. Parkinson, supra at 123. Yet, the Erickson court ignored strong historical evidence of an intent to diminish that is contained within the passage of the other Acts of Congress which opened other Sioux Indian Reservations in South Dakota to settlement by non-Indians.

The application of the diminishment decisions of this Court to the factors set forth directly above clearly illustrates that the United States Court of Appeals for the Eighth Circuit has decided a federal question in a way which conflicts with the applicable decisions of this Court. For that reason the State's Petition should be granted.

CONCLUSION

Based on the foregoing arguments and authorities, Petitioners Herman S. Solem, Warden,

South Dakota State Penitentiary, and Mark V. Meierhenry, Attorney General for the State of South Dakota, pray that their Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

April 19, 1982

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RE: CIVIL NO. 82-3009
JOHN BARTLETT, Petitioner vs.
HERMAN S. SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY, AND MARK V. MEIERHENRY, ATTORNEY GENERAL, STATE OF SOUTH DAKOTA, Respondents.

Gentlemen: MEMORANDUM OPINION

CASE SUMMARY

Petitioner filed this application for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, alleging that the crime for which he was convicted in state court occurred in "Indian country" as defined in 18 U.S.C. § 1151 and, therefore, the

state lacked jurisdiction to prosecute him. For the reasons which follow, petitioner's application for writ of habeas corpus is granted.

FACTUAL BACKGROUND

Petitioner, an enrolled member of the Cheyenne River Sioux Tribe, entered a plea of guilty in state court to a charge of attempted rape.[1] The crime occurred within the original

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[1] Petitioner's request for state post-conviction relief, pursuant to SDCL 23A-34, was denied on December 1, 1981, by Judge Scott C. Moses, presiding judge of the Eighth Judicial Circuit. The record does not reflect whether petitioner sought a certificate of probable cause, pursuant to SDCL 23A-34-20, to appeal Judge Moses' decision to the State Supreme Court. The State, however, admits in its answer, that petitioner has exhausted all available state remedies. The Court will rely on the State's answer in resolving any doubt concerning exhaustion of state remedies.

Moreover, a petitioner is not required to file futile applications in state courts. See Duckworth v. Serrano, 102 S.Ct. 18 (1981); Wilwording v. Swenson, 404 U.S. 249, 252 (1971); Powell v. Wyrick, 657 F.2d 222, 223-24 (8th Cir. 1981); and Rodgers v. Wyrick, 621 F.2d 921, 924 (8th Cir. 1980). In light of the South Dakota Supreme Court's position on the precise jurisdictional issue here, as stated in Stankey v. Waddel, 256 N.W.2d 117 (S.D. 1977), and more recently in State v.

confines of the Cheyenne River Indian Reservation, and on unallotted land inside that portion of the reservation opened to settlement by the Act of May 29, 1908, 35 Stat. 460. Petitioner contends that crimes committed in "Indian country," as defined in 18 U.S.C. § 1151, result in exclusive tribal or federal jurisdiction, thereby excluding state jurisdiction unless the reservation has been disestablished by congressional action. The State, however, contends that the Act of May 29, 1908 divested the tribe and federal government of jurisdiction over unalloted lands on the Cheyenne River Indian Reservation.

DISCUSSION

The jurisdictional issue involved here has been litigated extensively in both federal and state court, and has produced conflicting judicial

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Janis, ___ N.W.2d ___, No. 13237 (March 10, 1982), any effort by the petitioner to obtain relief from the State Supreme Court would be rendered futile.

opinions. In 1973, the Eighth Circuit Court of Appeals in United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973), held that the 1908 Act opening certain portions of the Cheyenne River Reservation to non-Indian settlement did not diminish the boundaries of that reservation, and the state was thus precluded from exercising its criminal jurisdiction over the Indian defendant. Six years later, the Eighth Circuit Court of appeals, in United States v. Dupris, 612 F.2d 319 (8th Cir. 1979), relying on Erickson, reversed the district court,[2] and again held that the 1908 Act did not diminish the boundaries of the reservation. See generally Note, Jurisdictional Confusion on the Cheyenne River Indian Reservation: United States v. Dupris, 25 S.D. L. Rev. 355 (1981).

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[2] United States v. Juvenile, 453 F.Supp. 117 (D.S.D. 1978).

Prior to the Dupris decision, however, the South Dakota Supreme Court in Stankey v. Waddell, 256 N.W.2d 117 (S.D. 1977) questioned the continuing validity of Erickson, and held that the Cheyenne River Indian Reservation was diminished by the 1908 Act. Moreover, the state's high court recently reaffirmed that holding in State v. Janis, ___ N.W.2d ___, No. 13237 (March 10, 1982).

Subsequent to the Eighth Circuit Court of Appeals rules in Dupris, Dupris petitioned the United States Supreme Court for a writ of certiorari. While the petition for certiorari remained pending before the Supreme Court, the United States filed a motion to dismiss the information against Dupris. Notwithstanding the Government's motion, petitioner declined to withdraw his petition and the district court declined to rule on the government's motion pending the Supreme Court's action on the petition. The Supreme Court granted certiorari, vacated the judgment of

the Eighth Circuit, and remanded the case to the district court to consider the question of mootness.[3] Dupris v. United States, 446 U.S. 980 (1980).

On remand, the district court denied the motion to dismiss as not in the best interests of the public. United States v. Dupris, Cr. 77-30056-01 (D.S.D., May 28, 1981). The Government appeal, contending that the trial court exceeded the discretion conferred upon it by the "leave of court" language of Rule 48(a) of the Federal Rules of Criminal Procedure. The Eighth Circuit Court of Appeals concluded that the district court erred in finding that the case was not moot, and in denying the Rule 48(a) motion. Accordingly, the case was reversed and remanded, and the district court was directed to

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[3] The petitioner was convicted and sentenced prior to the Eighth Circuit Court of Appeals' ruling in Dupris. Petitioner's state post-conviction relief was denied subsequent to the Supreme Court's vacation of the judgment in Dupris.

grant the government's motion to dismiss the information against Dupris. United States v. Dupris, 664 F.2d 169 (8th Cir. 1981).

Although certiorari was granted in Dupris, and the judgment of the Eighth Circuit Court of Appeals was vacated, the Supreme Court declined to rule on the merits of the underlying jurisdictional issue. For that reason, this Court is bound by the controlling precedent established in Dupris and Erickson, wherein the Eighth Circuit Court of Appeals held that the Act of May 29, 1908 did not diminish the boundaries of the Cheyenne River Indian Reservation. Accordingly, the State of South Dakota was precluded from exercising its criminal jurisdiction over the defendant in the instant case.

For the foregoing reasons, Bartlett's petition for writ of habeas corpus is granted. The issuance of the Writ, however, is stayed for 30 days. If the State fails to file an appeal within

30 days, the Writ shall issue forthwith. If the State does file an appeal within 30 days, the stay will remain in effect pending the outcome of the appeal.

BY THE COURT:

/s/ DONALD J. PORTER
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 82-1582

John Bartlett, Appellee, v. HERMAN S. SOLEM, Warden, South Dakota State Penitentiary; and MARK V. MEIERHENRY, Attorney General, State of South Dakota, Appellants.	*	APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

Submitted: September 15, 1982

Filed: October 27, 1982

Before LAY, Chief Judge, HEANEY, BRIGHT, ROSS, McMILLIAN, and JOHN R. GIBSON, Circuit Judges, En banc.

HEANEY, Circuit Judge, with whom LAY, Chief Judge, and BRIGHT, ROSS and JOHN R. GIBSON, Circuit Judges, join.

The United States District Court for the District of South Dakota granted John Bartlett's petition for a writ of habeas corpus on the ground that the State of South Dakota lacked jurisdiction to try Bartlett because his crime was committed on land that was part of the Cheyenne River Reservation. In so holding, the court relied on this Court's opinion in United States v. Dupris, 612 F.2d 319 (8th Cir. 1979), vacated and remanded, 446 U.S. 980 (1980), in which we held that the Act of May 29, 1908, 35 Stat. 460, did not diminish the boundaries of the reservation established by the Act of March 2, 1889, 25 Stat. 888. See 612 F.2d at 323.

The State of South Dakota on appeal contends that Dupris is wrongly decided and asks that the Court en banc reject the panel opinion in that case. We decline to do so and affirm the decision of the district court for the reasons set forth in United States v. Dupris, supra; United

States v. Long Elk, 565 F.2d 1032 (8th Cir. 1977), and United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973).

The appellants argue that United States ex rel. Condon v. Erickson, supra, was decided before DeCoteau v. District County Court, 420 U.S. 425 (1975), and Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), and the review of the 1908 act in Condon was not complete. DeCoteau and Rosebud were thoroughly analyzed by this Court in United States v. Dupris, supra, and United States v. Long Elk, supra. We conclude that the views expressed by this Court in Condon, Long Elk and Dupris are consistent with the opinions of the Supreme Court in DeCoteau and Rosebud.

McMILLIAN, Circuit Judge, dissenting, with whom ARNOLD, Circuit Judge, joins.

I must respectfully dissent. For the reasons discussed in my dissenting opinion in United States v. Dupris, 612 F.2d 319, 323 (8th Cir.

1979), vacated and remanded, 446 U.S. 980 (1980), I would hold that the 1908 statute diminished the boundaries of the Cheyenne River Reservation. I continue to believe that the analysis in United States v. Long Elk, 565 F.2d 1032 (8th Cr. 1977), and United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973), requires modification in light of Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), and DeCoteau v. District County Court, 420 U.S. 425 (1974).

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,

EIGHTH CIRCUIT

APPENDIX C

18 U.S.C. § 1151 "Indian Country" defined:

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

APPENDIX D

Act of May 29, 1908, 35 Stat. 460.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell and dispose of all that portion of the Cheyenne River and Standing Rock Indian reservations in the States of South Dakota and North Dakota lying and being within the following described boundaries, to-wit: Beginning at a point on the one hundred and second meridian of longitude west, where the township line between townships nine and ten north intersects the same; thence east on said township line to a point where the same intersects the range line between ranges twenty-four and twenty-five east of the Black Hills meridian; thence north on said range line to a point where the same intersects the township line

between townships fifteen and sixteen north; thence east along said township line to a point in the center of the main channel of the Missouri River; thence in a northerly direction along the center of the main channel of said Missouri River to a point where the township line between townships eighteen and nineteen north intersects the same, and including also entirely all islands, if any, in said river; thence west on said township line to a point where the range line between ranges twenty-two and twenty-three east intersects the same; thence north along said range line to the northwest corner of section nineteen in township twenty-one north of range twenty-three east; thence east on the section line north of sections nineteen twenty, twenty-one, twenty-two, twenty-three and twenty-four to a point where the same intersects the range line between ranges twenty-three and twenty-four east; thence

north along said range line to the State line between the States of South Dakota and North Dakota; thence west on said State line to a point where the range line between ranges eighty-four and eighty-five west in North Dakota intersects the same; thence north on said range line to a point where said range line intersects the center of the main channel of the South Fork of the Cannon Ball River; thence in a westerly direction up and along the center of the main channel of the said river to a point where the same intersects the one hundred and second meridian of longitude west; thence south along said one hundred and second meridian of longitude west; thence south along said one hundred and second meridian of longitude west to the place of beginning, except such portions thereof as have been alloted to Indians: Provided, that sections sixteen and thirty-six of the lands in each township therein shall not be disposed of, but shall be reserved for the use of the common schools of the

States of South Dakota and North Dakota, as the same may be located in the said States, respectively: Provided further, That the Secretary of the Interior may reserve such lands as he may deem necessary for agency, school, and religious purposes, to remain reserved as long as needed, and as long as agency, school, or religious institutions are maintained thereon for the benefit of said Indians: Provided, however, that the Secretary of the Interior is hereby authorized and directed to issue a patent in fee simple to the duly authorized missionary board, or other proper authority of any religious organization heretofore engaged in mission or school work on said reservations, for such lands thereon (not included in any town site herein provided for) as have been heretofore set apart to such organization for mission or school purposes.

SEC. 2. That the lands shall be disposed of by proclamation under the general provisions of the homestead and town-site laws of the United

States, and shall be opened to settlement and entry to proclamation of the President, which proclamation shall prescribe the manner in which the lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation: Provided, That prior to the said proclamation the Secretary of the Interior, in his discretion, may permit Indians who have an allotment within the area described in section one of this Act to relinquish such allotment and to receive in lieu thereof an allotment anywhere within the respective reservations thus diminished to which reservation the said Indians may belong: Provided further, That prior to the said proclamation the Secretary of the Interior shall cause allotments to be made to every man, woman, and child belonging to or holding tribal relations in said Cheyenne River and Standing Rock reservations who have not

heretofore received the allotments to which they are entitled under provisions of existing laws: Provided futher, That the Secretary of the Interior be, and he is hereby, authorized and directed to cause to be surveyed all the lands embraced within said reservations, and to cause an examination to be made of the lands by experts of the Geological Survey, and if there be found any lands bearing coal, the said Secretary is hereby authorized to reserve them from allotment or disposition until further action by Congress: Provided further, That the rights of honorably discharged Union soldiers and sailors of the late civil and Spanish wars or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged.

SEC. 3. That the price of said lands entered as homesteads under the provisions of this Act shall be fixed by appraisement as herein provided. The President of the United States shall appoint two commissions, one for each reservation, each commission to consist of three persons to inspect, appraise, and value all of said lands that shall not have been allotted in severalty to said Indians, or reserved by the Secretary of the Interior or otherwise disposed of, and excepting sections sixteen and thirty-six in each of said townships, each commission to be constituted as follows: One resident citizen of the States of North or South Dakota, one representative of the Indian Bureau and one person holding tribal relations with one of said tribes of Indians. That within twenty days after their appointment the said commissioners so appointed for each of the said reservations, respectively, shall meet and organize by the election of one of their number as chairman. Each commission is hereby

empowered to select such clerks and assistants at such compensation as the Secretary of the Interior may approve. That said commissioners shall then proceed to personally inspect, classify, and appraise, in one hundred and sixty acre tracts each, all of the remaining lands embraced within each reservation as described in section one of this Act. In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, grazing land, fourth, timber land; fifth, mineral land, if any, the mineral land not to be appraised. That said commissioners shall be paid a salary of not to exceed ten dollars per day each while actually employed in the inspection and classification of said lands and necessary expenses to be approved by the Secretary of Interior; such inspection and classification to be completed within six months from the date

of the organization of said commissions respectively, and no compensation shall be paid to either the commissioners or employees after the said six months. That when said commissions shall have completed the classification and appraisement of all of said lands the same shall be subject to the approval of the Secretary of the Interior.

SEC. 4. That the price of said lands shall be paid in accordance with the rules and regulations to be prescribed by the Secretary of the Interior upon the following terms: One fifth of the purchase price to be paid in cash at the time of entry, and the balance in five equal annual installments, to be paid in one, two, three, four, and five years, respectively, from and after the date of entry. In case any entryman fails to make the annual payments, or any of them, when due, all rights in and to the land covered by his entry shall cease, and any payments theretofore made shall be forfeited and entry canceled, and

the lands shall be reoffered for sale and entry under the provisions of the homestead law at the appraised price thereof: And provided, That nothing in this Act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed herein, receiving credit for payments previously made. In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law, where the price of land is one dollar and twenty-five cents per acre, and when the entryman shall have complied with all the requirements and terms of the homestead laws as to settlement and residence and shall have made all the required payments aforesaid he shall be entitled to a patent for the lands entered: And provided further, That all lands remaining undisposed of at

the expiration of four years from the opening of said lands to entry may, in the discretion of the Secretary of the Interior, be reappraised in the manner provided for in this Act. And it is further provided that any lands remaining unsold after said lands have been open to entry for seven years may be sold to the highest bidder for cash without regard to the prescribed price thereof fixed under the provisions of this Act, under such rules and regulations as the Secretary of the Interior may prescribe.

SEC. 5. That the Secretary of the Interior is authorized to reserve from said lands such tracts for townsite purposes as in his opinion may be required for the future public interests, and he may cause the same to be surveyed into blocks and lots and disposed of under such regulations as he may prescribe, in accordance with section twenty-three hundred and eighty-one of the United States Revised Statutes. The net proceeds

derived from the sale of such lands shall be credited to the Indians as hereinafter provided.

Sec. 6. That from the proceeds arising from the sale and disposition of the lands aforesaid, exclusive of the customary fees and commissions, there shall be deposited in the Treasury of the United States, to the credit of the Indians belonging and having tribal rights on the reservations aforesaid in the States of South Dakota and North Dakota the sums to which the respective tribes may be entitled, which shall draw interest at three per centum per annum; that the moneys derived from the sale of said lands and deposited in the Treasury of the United States to the credit of said Indians respectively shall be expended for their benefit under the direction of the Secretary of the Interior.

SEC. 7. That sections sixteen and thirty-six of the land in each township within the tract described in section one of this Act shall not be

subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at one dollar and twenty-five cents per acre, and the same are hereby granted to the States of South Dakota and North Dakota for such purpose as the same are located in the said States respectively; and in case any of said sections, or parts thereof, are lost to said States by reason of allotments thereof to any Indian or Indians, or otherwise, the governors of said States, respectively, with the approval of the Secretary of the Interior, are hereby authorized, within the area in the respective States described in section one of this Act, to locate other lands not occupied not exceeding two sections in any one township, which shall be paid for by the United States as herein provided, in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement.

SEC. 8. That there is hereby appropriated, out of any money in the Treasury not otherwise

appropriated, the sum of not more than two hundred and twenty-five thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the States of South Dakota and North Dakota, as provided in section seven of this Act. And there is hereby appropriated the further sum of seventy-five thousand dollars, or so much thereof as may be necessary, for the purpose of making the appraisement and classification and allotments provided for herein: Provided, That the latter appropriation, or any futher appropriation hereafter made for the purpose of carrying out the provisions of this Act, shall be reimbursed to the United States from the proceeds received from the sale of the lands described herein or from any money in the Treasury belonging to said Indian tribes respectively.

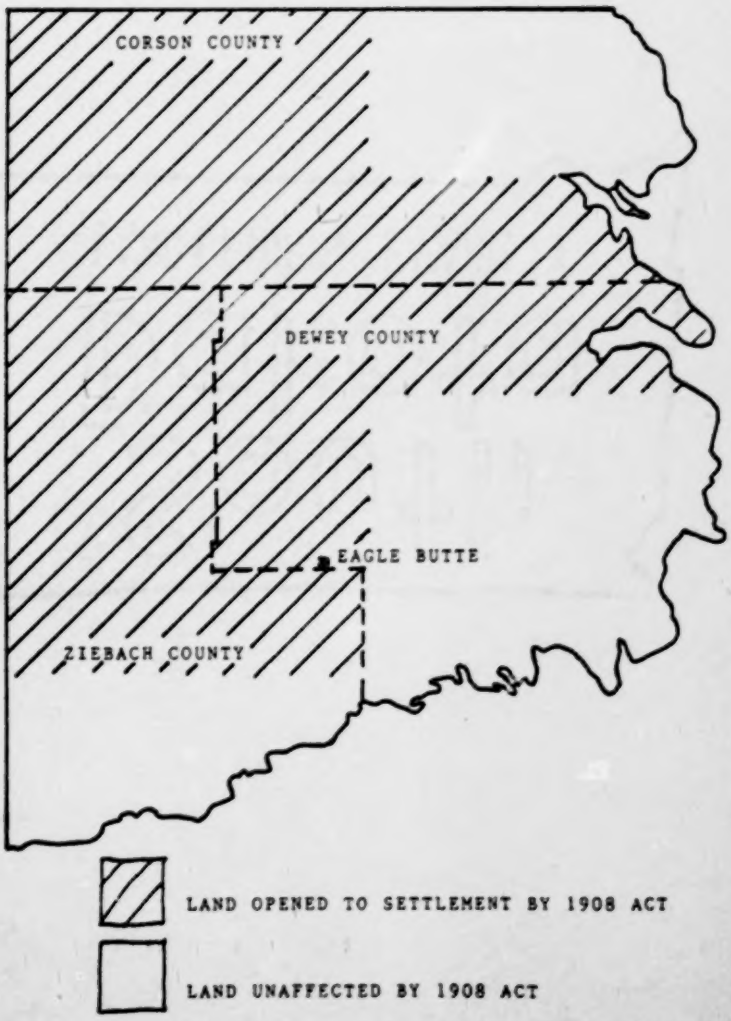
SEC. 9. That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or

the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of the said lands and to expend and pay over the proceeds received from the sale thereof only as received and as herein provided: Provided, That nothing in this Act shall be construed to deprive the said Indians of the Cheyenne River or Standing Rock Indian reservations, in South Dakota and North Dakota, of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this Act: Provided, That Indians residing upon their allotments in townships sixteen north of ranges twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty, and thirty-one east shall have the right to use timber in said townships, except on

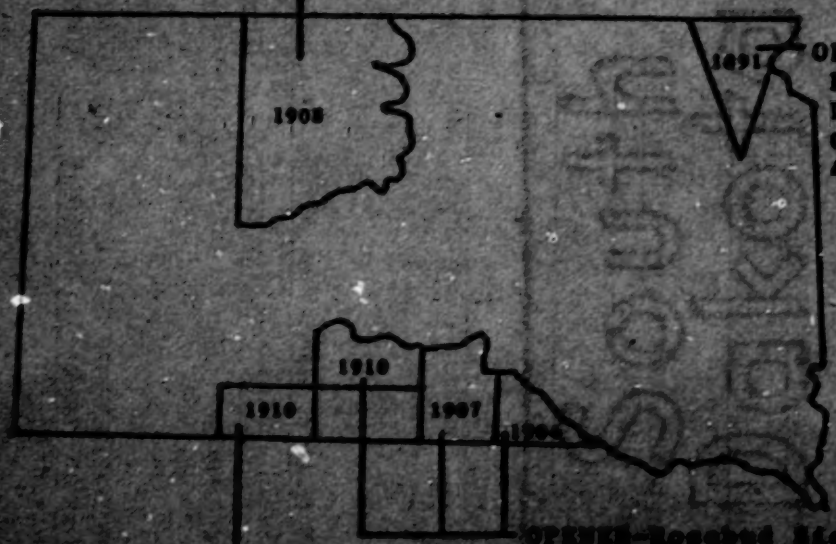
sections sixteen and thirty-six for domestic purposes only as long as the lands remain part of the public domain.

Approved, May 29, 1908.

APPENDIX E


CORSON COUNTY
DEWEY COUNTY
EAGLE BUTTE
ZIEBACH COUNTY
LAND OPENED TO SETTLEMENT BY 1908 ACT
LAND UNAFFECTED BY 1908 ACT

IN QUESTION:
STATE-South Dakota v. Janis, 317 N.W.2d 133(S.D.-1982).
FEDERAL-Bartlett v. Solem, 691 F.2d 420(8th Cir. 1982).



OPENED-
DeCoteau v.
District County
Court, 420 U.S.
425(1975).

OPENED-Rosebud Sioux Tribe v.
Kneip, 430 U.S. [illegible]

OPENED-United States ex rel. Cook v. Parsons,
525 F.2d [illegible] Cir. 1975), cert. [illegible]
430 U.S. [illegible]

APPENDIX A

15-7

APPENDIX G

FORM FOR USE IN APPLICATIONS

FOR HABEAS CORPUS UNDER 28 U.S.C. § 2254

JOHN BARTLETT
Name

19455
Prison Number

South Dakota State Penitentiary, P. O. Box 911,

Sioux Falls, South Dakota 57101
Place of Confinement

United States District Court Southern Division
District of South Dakota

Case No. _____
(To be supplied by Clerk of U.S. District Court)

JOHN DAVID BARTLETT, PETITIONER
(Full name) (Include name under which you were convicted)

V.

HERMAN SOLEM, Warden of the South Dakota State Penitentiary, RESPONDENT
(Name of Warden, Superintendent, Jailor, or authorized person having custody of petitioner)

and

THE ATTORNEY GENERAL OF THE STATE OF South Dakota, MARK V. MEIERHENRY, ADDITIONAL RESPONDENT.

(If petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. § 2255, in the federal court which entered the judgment.)

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

INSTRUCTIONS--READ CAREFULLY

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and subscribed to under penalty of perjury as being true and correct. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form. Where more room is needed to answer any question use reverse side of sheet.

(2) Additional pages are not permitted. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt of a fee of $5.00 your petition will be filed if it is in proper order.

(4) If you do not have the necessary filing fee, you may request permission to proceed in forma pauperis, in which event you must execute the affidavit on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed in forma pauperis, you must have an

authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds $_____, you must pay the filing fee as required by the rule of the district court.

(5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(7) When the petition is fully completed, the original and two copies must be mailed to the Clerk of the United States District Court whose address is Clerk of Court, U.S. District Court, 400 South Phillips Avenue, Sioux Falls, South Dakota 57102.

(8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION

1. Name and location of court which entered the judgment of conviction under attack Eighth Judicial Circuit Court, Timber Lake, South Dakota.

2. Date of judgment of conviction May 2, 1979.

3. Length of sentence Ten (10) years

   Sentencing judge Hon. Leslie R. Hersrud

4. Nature of offense or offenses for which you were convicted: Attempted Rape

5. What was your plea? (Check one)
   (a) Not guilty ( )
   (b) Guilty (x)
   (c) Nolo contendere ( )
   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

   _____
   _____
   _____
   _____

6. Kind of trial: (Check one)
   (a) Jury ( )
   (b) Judge only (x)

7. Did you testify at the trial? Yes ( ) No (x)

8. Did you appeal from the judgment of conviction? Yes ( ) No (x)

9. If you did appeal, answer the following:
   (a) Name of court _____
   (b) Result _____
   (c) Date of result _____
   If you filed a second appeal or filed a petition for certiorari in the Supreme Court, give details: _____

   _____
   _____
   _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal? Yes (x) No ( )

11. If your answer to 10 was "yes", give the following information:
    (a) (1) Name of court Eighth Judicial Circuit
    (2) Nature of proceeding Post Conviction Relief
    (3) Grounds raised Questions of Law: Lack of state jurisdiction on reservation.
    (4) Did you receive an evidentiary hearing on your petition, application or motion? Yes (x) No ( )
    (5) Result Denied.
    (6) Date of result December 1, 1981.
    (b) As to any second petition, application or motion give the same information:
    (1) Name of court _____
    (2) Nature of proceeding _____
    (3) Grounds raised _____
    (4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No ( )
    (5) Result _____
    (6) Date of result _____

(c) As to any third petition, application or motion, give the same information:
(1) Name of court _____
(2) Nature of proceeding _____
_____
(3) Grounds raised _____
_____
_____
_____
_____
(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No ( )
(5) Result _____
(6) Date of result _____

(d) Did you appeal to the highest state court having jurisdiction the result of any action taken on any petition, application or motion:
(1) First petition, etc. Yes ( ) No ( )
(2) Second petition, etc. Yes ( ) No ( )
(3) Third petition, etc. Yes ( ) No ( )

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:
_____
_____
_____
_____
_____

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. As to all grounds on which

you have previously exhausted state court remedies, you should set them forth in this petition if you wish to seek federal relief. If you fail to set forth all such grounds in this petition, you may be barred from presenting them at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted all your state court remedies with respect to them. However, you should raise in this petition all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

If you select one or more of these grounds for relief, you must allege facts in support of the ground or grounds which you choose. Do not check any of the grounds listed below. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendnent claim].
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which has unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: Conviction obtained by a violation of the protection against double jeopardy.
Supporting FACTS (tell your story briefly without citing cases or law): The petitioners constitutional rights have been violated by the state of South Dakota assuming jurisdiction on a matter that is alleged to be a crime wholly committed on Indian lands.

B. Ground two: _____

Supporting FACTS (tell your story briefly without citing cases or law): _____

C. Ground three: _____

Supporting FACTS (tell your story briefly without citing cases or law):

D. Ground four:

Supporting FACTS (tell your story briefly without citing cases or law):

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them:

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ( ) No (x)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing None.
(b) At arraignment and plea Raymond Kintz, Attorney at Law, Dupree, South Dakota.
(c) At trial Raymond Kintz, Attorney at Law, Dupree, South Dakota.
(d) At sentencing Raymond Kintz, Attorney at Law, Dupree, South Dakota.
(e) On appeal _____.
(f) In any post-conviction proceeding None.
(g) On appeal from any adverse ruling in a post-conviction proceeding: _____

_____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ( ) No (x)

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes ( ) No (x)
(a) If so, give name and location of court which imposed sentence to be served in the future: _____

_____
(b) And give date and length of sentence to be served in future: _____

_____
(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? Yes ( ) No (x)

Wherefore, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 14, 1982
(Date)

/s/ John D. Bartlett
(Signature)

Signature of Attorney
(if any)

APPENDIX H

Act of April 23, 1904, 33 Stat. 254

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the said agreement be, and the same hereby is, accepted, ratified, and confirmed as herein amended and modified, as follows:

Article I. The said Indians belonging on the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, situated within the boundaries of Gregory County, South Dakota, described more particularly as follows: Commencing in the middle of the main channel of the Missouri River at the intersection of the south line of Brule County; thence down said middle of the main channel of said river to the intersection

of the ninety-ninth degree of west longitude from Greenwich; thence due south to the forty-third parallel of latitude; thence west along said parallel of latitude to its intersection with the tenth guide meridian; thence north along said guide meridian to its intersection with the township line between townships one hundred and one hundred and one north; thence east along said township line to the point of beginning, the unallotted land hereby ceded approximating four hundred and sixteen thousand acres, lying and being within the boundaries of Gregory County, South Dakota, as said county is at present defined and organized.

Art. II. In consideration of the land ceded, relinquished, and conveyed by article one of this agreement, the United States stipulates and agrees to dispose of the same to settlers under the provisions of the homestead and townsite laws, except sections sixteen and thirty-six, or an equivalent of two sections in each township,

and to pay to said Indians the proceeds derived from the sale of said lands; and also the United States stipulates and agrees to pay for sections sixteen and thirty-six, or an equivalent of two sections in each township, two dollars and fifty cents per acre.

Art. III. It is agreed that of the amount to be derived from the sale of said lands to be paid to said Indians, as stipulated in article two of this agreement, the sum of two hundred and fifty thousand dollars shall be expended in the purchase of stock cattle, of native range or graded Texas two-year-old heifers and graded Durham or Hereford two-year-old bulls, for issue to said Indians, to be distributed as equally as possible among men, women, and children, but not more than one half of the money received in any one year shall be expended as aforesaid, and the other half shall be paid to said Indians per capita in cash, and an accounting, settlement, and payment shall be made in the month of October in

each year until the lands are fully paid for and the funds distributed in accordance with this agreement: Provided, however, That not more than five hundred thousand dollars shall be expended or paid within two years after the ratification of this agreement, and not to exceed one hundred and fifty thousand dollars in each of the following years until the expiration of five years.

Art. IV. It is further agreed that all persons of the Rosebud Indian Reservation, South Dakota, who have been allotted lands and who are now recognized as members of the tribe belonging on said reservation, including mixed-bloods, whether their white blood comes from the paternal or maternal side, and the children born to them, shall enjoy the undisturbed and peaceable possession of their allotted lands, and shall be entitled to all the rights and privileges of the tribe enjoyed by full-blood Indians upon the reservation;

and that white men heretofore lawfully intermarried into the tribe and now living with their families upon said reservation shall have the right of residence thereon, not inconsistent with existing statutes.

Art. V. It is understood that nothing in this agreement shall be construed to deprive the said Indians of the Rosebud Reservation, South Dakota, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement."

Sec. 2. That the lands ceded to the United States under said agreement, excepting such tracts as may be reserved by the President, not exceeding three hundred and ninety-eight and sixty-seven one-hundredths acres in all, for subissue station, Indian day school, one Catholic mission, and two Congregational missions, shall be disposed of under the general provisions of the homestead and town-site laws of the United States,

and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation, until after the expiration of sixty days from the time when the same are opened to settlement and entry: Provided, That the rights of honorably discharged Union soldiers and sailors of the late civil and the Spanish war or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged: And provided further, That the price of said lands entered as homesteads under the provisions of this Act shall be as follows: Upon all land entered or filed upon within three

months after the same shall be opened for settlement and entry, four dollars per acre, to be paid as follows: One dollar per acre when entry is made; seventy-five cents per acre within two years after entry; seventy-five cents per acre within three years after entry; seventy-five cents per acre within four years after entry, and seventy-five cents per acre within six months after the expiration of five years after entry. And upon all land entered or filed upon after the expiration of three months and within six months after the same shall be opened for settlement and entry, three dollars per acre, to be paid as follows: One dollar per acre when entry is made; fifty cents per acre within two years after entry; fifty cents per acre within three years after entry; fifty cents per acre within four years after entry, and fifty cents per acre within six months after the expiration of five years after entry. After the expiration of six months after the same shall be opened for settlement and entry

the price shall be two dollars and fifty cents per acre, to be paid as follows: Seventy-five cents when entry is made; fifty cents per acre within two years after entry; fifty cents per acre within three years after entry; fifty cents per acre within four years after entry, and twenty-five cents per acre within six months after the expiration of five years after entry: Provided, That in case any entryman fails to make such payment or any of them within the time stated all rights in and to the land covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited, and the entry shall be forfeited and held for cancellation and the same shall be cancelled: And provided, That nothing in this Act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed herein, receiving credit for payments previously made. In addition to the price to be paid for the

land, the entryman shall pay the same fees and commissions at the time of commutation or final entry, as now provided by law, where the price of the land is one dollar and twenty-five cents per acre: And provided further, That all lands herein ceded and opened to settlement under this Act, remaining undisposed of at the expiration of four years from the taking effect of this Act, shall be sold and disposed of for cash, under rules and regulations to be prescribed by the Secretary of the Interior, not more than six hundred and forty acres to any one purchaser.

Sec. 3. That the proceeds received from the sale of said lands in conformity with this Act shall be paid into the Treasury of the United States, and paid to the Rosebud Indians or expended on their account only as provided in article three of said agreement as herein amended.

Sec. 4. That sections sixteen and thirty-six of the lands hereby acquired in each township

shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose; and in case any of said sections, or parts thereof, of the land in said county of Gregory are lost to said State of South Dakota by reason of allotments thereof to any Indian or Indians, now holding the same, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, in the tract herein ceded, to locate other lands not occupied not exceeding two sections in any one township, which shall be paid for by the United States as herein provided in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement.

Sec. 5. That there is hereby appropriated, out of any money in the Treasury not otherwise

appropriated, the sum of seventy-five thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the State of South Dakota, as provided in section four of this Act.

Sec. 6. That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein; or to guarantee to find purchasers for said lands, or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided.

Approved, April 23, 1904.

APPENDIX I

Act of March 2, 1907, 35 Stat. 1240.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell or dispose of all that portion of the Rosebud Indian Reservation in South Dakota lying south of the Big White River and east of range twenty-five west of the sixth principal meridian, except such portions therof as have been, or may hereafter be, alloted to Indians: Provided, That sections sixteen and thirty-six of the lands in each township shall not be disposed of, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose.

Sec. 2. That the land shall be disposed of by proclamation, under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation: Provided, That prior to the said proclamation the Secretary of the Interior, in his discretion, may permit Indians who have an allotment within the Rosebud Reservation to relinquish such allotment and to receive in lieu thereof an allotment anywhere within said reservation, and he shall also allot one hundred and sixty acres of land to each child of Indian parentage whose father or mother is or was, in case of death, a duly enrolled member of

the Sioux tribe of Indians belonging on the Rosebud Reservation who is living at the time of the passage and approval of this Act and who has not heretofore received an allotment: Provided further, That the rights of honorably discharged Union soldiers and sailors of the late civil and Spanish wars or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged.

Sec. 3. That the price of said lands entered as homesteads under the provisions of this Act shall be as follows: Upon all land entered or filed upon within three months after the same shall be opened for settlement and entry, six dollars per acre, and upon all land entered or filed upon after the expiration of three months and within six months after the same shall have opened for settlement and entry, four dollars and

fifty cents per acre; after the expiration of six months after the same shall have been opened for settlement and entry the price shall be two dollars and fifty cents per acre. The price shall be paid in accordance with rules and regulations to be prescribed by the Secretary of the Interior upon the following terms: One-fifth of the purchase price to be paid in cash at the time of entry, and the balance in five equal annual installments, to be paid in one, two, three, four, and five years, respectively, from and after the date of entry. In case any entryman fails to make the annual payments, or any of them, promptly when due, all rights in and to the land covered by his entry shall cease, and any payments theretofore made shall be forfeited and the entry canceled, and the lands shall be reoffered for sale and entry under the provisions of the homestead law at the same price that it was first entered: And provided, That nothing in this Act

shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed herein, receiving credit for payments previously made. In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law, where the price of the land is one dollar and twenty-five cents per acre, and when the entryman shall have complied with all the requirements and terms of the homestead laws as to settlement and residence and shall have made all the required payments aforesaid he shall be entitled to a patent for the lands entered: And provided further, that all lands remaining undisposed of at the expiration of four years from the opening of the said lands to entry shall be sold to the highest bidder for cash at not less than two dollars and fifty cents per acre, under

rules and regulations to be prescribed by the Secretary of the Interior, and that any lands remaining unsold after the said lands have been opened to entry for seven years may be sold to the highest bidder for cash, without regard to the above minimum limit of price.

Sec. 4. That the Secretary of the Interior is authorized to reserve from said lands such tracts for town-site purposes as in his opinion may be required for the future public interests, and he may cause the same to be surveyed into blocks and lots and disposed of under such regulations as he may prescribe, in accordance with section twenty-three hundred and eighty-one of the United States Revised Statutes. The net proceeds derived from the sale of such lands shall be credited to the Indians as hereinafter provided.

Sec. 5. That from the proceeds arising from the sale and disposition of the lands aforesaid, exclusive of the customary fees and

commissions, there shall be deposited in the Treasury of the United States, to the credit of the Indians belonging and having tribal rights on the Rosebud Reservation, in the State of South Dakota, the sum of one million dollars, which shall draw interest at three per centum per annum for ten years, the interest to be paid to the Indians per capita in cash annually, share and share alike; that at the expiration of ten years, after one million dollars shall have been deposited as aforesaid, the said sum shall be distributed and paid to said Indians per capita in cash; that the balance of the proceeds arising from the sale and disposition of the lands as aforesaid shall be deposited in the Treasury of the United States to the credit of said Indians and shall be expended for their benefit under the direction of the Secretary of the Interior, and he may, in his discretion, upon an application by a majority of said Indians, pay a portion of the same to the Indians in cash, per capita, share

and share alike, if in his opinion such payments will be for the best interests of said Indians.

Sec. 6. That sections sixteen and thirty-six of the lands in each township within the tract described in section one of this Act shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose; and in case any of said sections, or parts thereof, are lost to said State of South Dakota by reason of allotments thereof to any Indian or Indians, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, within the tract described herein, to locate other lands not occupied not exceeding two sections in any one township, which shall be paid for by the United States as herein provided, in quantity equal to the loss,

and such selections shall be made prior to the opening of such lands to settlement.

Sec. 7. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of one hundred and sixty-five thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the State of South Dakota, as provided in section six of this Act. And there is hereby appropriated the further sum of fifteen thousand dollars, or so much thereof as may be necessary, for the purpose of making the allotments provided for herein: Provided, That the same shall be reimbursed to the United States from the proceeds received from the sale of the lands described herein or from any money in the Treasury belonging to said Rosebud Indians.

Sec. 8. That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described,

except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided: Provided, That nothing in this Act shall be construed to deprive the said Indians of the Rosebud Reservation, in South Dakota, of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this Act.

Approved, March 2, 1907.

APPENDIX J

Act of May 30, 1910, 36 Stat. 448.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell and dispose of all that portion of the Rosebud Indian Reservation, in the State of South Dakota, lying and being within the counties of Mellette and Washabaugh, south of the White River, and being described and bounded as follows: Beginning at a point on the third guide meridian west where the township line between townships thirty-nine and forty intersects the same, thence north along said guide meridian to the middle of the channel of White River, thence west along the middle of the main channel of White River to the point of intersection with the line dividing the Rosebud and the Pine Ridge Indian reservations, thence south along the boundary line between said reservations to the township line separating townships

thirty-nine and forty, thence east along said township line to the place of beginning, except such portions thereof as have been or may be hereafter allotted to Indians or otherwise reserved, and except lands classified as timber lands: Provided, That any Indians to whom allotments have been made on the tract to be ceded may, in case they elect to do so before said lands are offered for sale, relinquish same and select allotments in lieu thereof on the diminished reservation: And provided further, That the Secretary of the Interior may reserve such lands as he may deem necessary for agency, school, and religious purposes, to remain reserved as long as needed and as long as agency, school, or religious institutions are maintained thereon for the benefit of said Indians: And provided further, That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee simple to the duly authorized missionary board, or other authority,

of any religious organization heretofore engaged in mission or school work on said reservation for such lands thereon (not included in any town-site hereinafter provided for) as have heretofore been set apart to such organization for mission or school purposes.

Sec. 2. That the lands shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which the lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation: Provided, That prior to said proclamation the allotments within the portion of the said Rosebud Reservation to be disposed of as prescribed herein shall have been completed: Providedfurther, That the rights of honorably

discharged Union soldiers and sailors of the late civil and Spanish wars or Philippine insurrection as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes as amended by the Act of March first, nineteen hundred and one, shall not be abridged.

Sec. 3. That before any of the land is disposed of, as hereinafter provided, and before the State of South Dakota shall be permitted to select or locate any lands to which it may be entitled by reason of the loss of sections sixteen or thirty-six, or any portions thereof, by reason of allotments thereof to any Indian or Indians, the Secretary of the Interior is authorized to reserve from said lands such tracts for town-site purposes as in his opinion may be required for the future public interests, and he may cause same to be surveyed into lots and blocks and disposed of under such regulations as he may prescribe; and he is hereby authorized to set

apart and reserve for school, park, and other public purposes not more than ten acres in any town-site, and patents shall be issued for the lands so set apart and reserved for school, park, and other public purposes to the municipality legally charged with the care and custody of lands donated for such purposes. The purchase price of all town lots sold in town-sites, as hereinafter provided, shall be paid at such time and in such installments as the Secretary of the Interior may direct, and he shall cause not more than twenty per centum of the net proceeds arising from such sales to be set apart and expended under his direction in the construction of schoolhouses or other public buildings or in improvements within the town-sites in which such lots are located. The net proceeds derived from the sale of such lots and lands within the town-sites as aforesaid, less the amount set aside to aid in the construction of schoolhouses or other

public buildings or improvements, shall be credited to the Indians as hereinafter provided.

Sec. 4. That the price of said lands entered as homesteads under the provisions of this Act shall be fixed by appraisement, as herein provided. The President shall appoint a commission to consist of three persons to classify, appraise, and value all of said lands that shall not have been alloted in severalty to said Indians, or reserved by the Secretary of the Interior or otherwise disposed of, and excepting sections sixteen and thirty-six or other lands which may be selected in lieu thereof by the State of South Dakota, in each of said townships, said commission to be constituted as follows: One resident citizen of the State of South Dakota, one representative of the Interior Department, and one person holding tribal relations with said tribe of Indians. That within twenty days after their appointment the said commissioners shall meet and organize by the election of one of their number as

chairman. The said commissioners shall then proceed to personally inspect, classify, and appraise, in one hundred and sixty acre tracts each, all of the remaining unallotted lands embraced within that portion of the reservation described in section one of this Act. In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, grazing land; fourth, timber land; fifth, mineral land, if any, but the mineral and timber lands shall not be appraised: Provided, That timber lands may be classified without regard to acreage: And provided further, That all lands classified as timber lands shall be reserved for the use of the Rosebud Indians. That said commissioners shall be paid a salary of not to exceed ten dollars per day each while actually employed in the inspection, classification and appraisement of said

lands, and necessary expenses exclusive of subsistence to be approved by the Secretary of the Interior, such inspection, classification and appraisement to be completed within six months from the date of organization of said commission.

Sec. 5. That said commission shall be governed by regulations prescribed by the Secretary of the Interior; and after the completion of the classification and appraisement of all of said lands the same shall be subject to the approval of the Secretary of the Interior.

Sec. 6. That the price of said lands disposed of under the homestead laws shall be paid in accordance with rules and regulations to be prescribed by the Secretary of the Interior upon the following terms: One-fifth of the purchase price to be paid in cash at the time of entry and the balance in five equal annual installments, to be paid in two, three, four, five, and six years, respectively, from and after the date of entry.

In case any entryman fails to make the annual payments, or any of them, when due, all rights in and to the land covered by his entry shall cease, and any payments theretofore made shall be forfeited and the entry canceled, and the lands shall be again subject to entry under the provisions of the homestead law at the appraised price thereof: And provided, That nothing in this Act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the appraised price, receiving credit for payments previously made. In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law where the price of land is one dollar and twenty-five cents per acre, and when the entryman shall have complied with all the requirements and terms of the homestead laws

as to settlement and residence and shall have made all the required payments aforesaid he shall be entitled to a patent for the lands entered: And provided further, That all lands remaining undisposed of at the expiration of four years from the opening of said lands to entry may, in the discretion of the Secretary of the Interior, be reappraised in the manner provided for in this Act.

Sec. 7. That from the proceeds arising from the sale and disposition of the lands aforesaid, exclusive of the customary fees and commissions, there shall be deposited in the Treasury of the United States, to the credit of the Indians belonging and having tribal rights on the said reservation, the sums to which the said tribe may be entitled, which shall draw interest at three per centum per annum; that the moneys derived from the sale of said lands and deposited in the Treasury of the United States to the credit

of said Indians shall be at all times subject to appropriation by Congress for their education, support, and civilization.

Sec. 8. That sections sixteen and thirty-six of the land in each township within the tract described in section one of this Act shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose, and in case any of said sections, or parts thereof, are lost to said State by reason of allotments thereof to any Indian or Indians, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, within the area described in section one of this Act, to locate other lands not otherwise appropriated, which shall be paid for by the United States as herein provided, in quantity equal to the loss, and such selections shall be made prior

to the opening of such lands to settlement: Provided, That in any event not more than two sections shall be granted to the State in any one township, and lands must be selected in lieu of sections sixteen or thirty-six, or both, or any part thereof, within the township in which the loss occurs, except in any township where there may not be two sections of unallotted lands, in which event whatever is required to make two sections may be selected in any adjoining township.

Sec. 9. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of not more than one hundred and twenty-five thousand dollars, or so much therof as may be necessary, to pay for the lands granted to the State of South Dakota, as provided in section eight of this Act. And there is hereby appropriated the further sum of thirty-five thousand dollars, or so much thereof as may

be necessary, for the purpose of making the appraisement and classification provided for herein: Provided, That the latter appropriation, or any further appropriation hereafter made for the purpose of carrying out the provisions of this Act, shall be reimbursed to the United States from the proceeds received from the sale of the lands described herein or from any money in the Treasury belonging to said Indian tribe.

Sec. 10. That the lands allotted, those retained or reserved, and the surplus land sold, set aside for town-site purposes, granted to the State of South Dakota, or otherwise disposed of, shall be subject for a period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country.

Sec. 11. That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six,

or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of the said lands, and to expend and pay over the procceds received from the sale thereof only as received and as herein provided: Provided, That nothing in this Act shall be construed to deprive the said Indians of the Rosebud Indian Reservation of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this Act.

Approved, May 30, 1910.

APPENDIX K

Act of May 27, 1910, 36 Stat. 440.

Be it enacted by the Senate and House of Representativesof the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell and dispose of all that portion of the Pine Ridge Indian Reservation, in the State of South Dakota, lying and being in Bennett County and described as follows: Beginning at a point on the eastern boundary line of the Pine Ridge Indian Reservation, in South Dakota, where the same intersects the boundary line between the States of South Dakota and Nebraska; thence north along said eastern boundary line to the township line separating townships thirty-nine and forty; thence west along said township line to the fifth guide meridian; thence south along said fifth guide meridian to the boundary line between the said States of South Dakota and Nebraska; thence east

along said state line to the place of beginning, except such portions thereof as have been or may be hereafter allotted to Indians or otherwise reserved, and except lands classified as timber lands: Provided, That any Indians to whom allotments have been made on the tract to be ceded may, in case they elect to do so before said lands are offered for sale, relinquish same and select allotments in lieu thereof on the diminished reservation: And provided further, That the Secretary of the Interior may reserve such lands as he may deem necessary for agency, school, and religious purposes, to remain reserved as long as needed, and as long as agency, school, or religious institutions are maintained thereon, for the benefit of said Indians: And provided further, That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee simple to the duly authorized missionary board, or other authority, of any religious organization, heretofore engaged in mission or school

work on said reservation for such lands thereon (not included in any town-site hereinafter provided for) as have heretofore been set apart to such organization for mission or school purposes.

Sec. 2. That the lands shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which the lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation: Provided, That prior to said proclamation the allotments within the portion of the said Pine Ridge Reservation to be disposed of as described herein shall have been completed: Provided further, That the rights of honorably discharged Union soldiers and sailors of the late civil and Spanish wars or Philippine insurrection,

as defined and described in sections twenty-three and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged.

Sec. 3. That before any of the land is disposed of, as hereinafter provided, and before the State of South Dakota shall be permitted to select or locate any lands to which it may be entitled by reason of the loss of sections sixteen or thirty-six, or any portions thereof, by reason of allotments thereof to any Indian or Indians, the Secretary of the Interior is authorized to reserve from said lands such tracts for town-site purposes as in his opinion may be required for the future public interests, and he may cause same to be surveyed into lots and blocks and disposed of under such regulations as he may prescribe, in accordance with section twenty-three hundred and eighty-one of the Revised Statutes of the United States; and he is hereby

authorized to set apart and reserve for school, park, and other public purposes not more than ten acres in any town-site, and patents shall be issued for the lands so set apart and reserved for school, park, and other public purposes to the municipality legally charged with the care and custody of lands donated for such purposes. The purchase price of all town lots sold in town-sites, as hereinafter provided, shall be paid at such time and in such installments as the Secretary of the Interior may direct, and he shall cause not more than twenty per centum of the net proceeds arising from such sales to be set apart and expended under his direction in aiding the construction of schoolhouses or other public buildings or in improvements within the town-sites in which such lots are located. The net proceeds derived from the sale of such lots and lands within the town-sites as aforesaid, less the amount set aside to aid in the construction of schoolhouses or other public buildings or improvements,

shall be credited to the Indians as hereinafter provided.

Sec. 4. That the price of said lands entered as homesteads under the provisions of this Act shall be fixed by appraisement as herein provided. The President shall appoint a commission to consist of three persons to classify, appraise, and value all of said lands that shall not have been allotted in severalty to said Indians, or reserved by the Secretary of the Interior, or otherwise disposed of, and excepting sections sixteen and thirty-six or other lands which may be selected in lieu thereof by the State of South Dakota, in each of said townships, said commission to be constituted as follows: One resident citizen of the State of South Dakota, one representative of the Interior Department, and one person holding tribal relations with said tribe of Indians. That within twenty days after their appointment the said commissioners shall meet and organize by the election of one of their number as

chairman. The said commissioners shall then proceed to personally inspect, classify, and appraise, in one hundred and sixty acre tracts each, all of the remaining unallotted lands embraced within that portion of the reservation described in section one of this Act. In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, grazing land; fourth, timber land; fifth, mineral land, if any, but the mineral and timber lands shall not be appraised: Provided, That timber lands shall be classified without regard to acreage: And provided further, That all lands classified as timber lands shall be reserved for the use of the Pine Ridge Indians. That said commissioners shall be paid a salary of not to exceed ten dollars per day each while actually employed in the inspection, classification and

appraisement of said lands, and necessary expenses exclusive of subsistence to be approved by the Secretary of the Interior, such inspection, classification and appraisement to be completed within six months from the date of organization of said commission.

Sec. 5. That said commission shall be governed by regulations prescribed by the Secretary of the Interior, and after the completion of the classification and appraisement of all of said land the same shall be subject to the approval of the Secretary of the Interior.

Sec. 6. That the price of said lands disposed of under the homestead laws shall be paid in accordance with rules and regulations to be prescribed by the Secretary of the Interior upon the following terms: One-fifth of the purchase price to be paid in cash at the time of entry, and the balance in five equal annual installments, to be paid in two, three, four, five, and six years,

respectively, from and after the date of entry. In case any entryman fails to make the annual payments, or any of them, when due, all rights in and to the land covered by his entry shall cease, and any payments theretofore made shall be forfeited and the entry canceled, and the lands shall be again subject to entry under the provisions of the homestead law at the appraised price thereof: Provided, That nothing in this Act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the appraised price, receiving credit for payments previously made. In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law where the price of land is one dollar and twenty-five cents per acre, and when the entryman shall have complied with all the

requirements and terms of the homestead laws as to settlement and residence and shall have made all the required payments aforesaid he shall be entitled to a patent for the lands entered: And provided further, That all lands remaining undisposed of at the expiration of four years from the opening of said lands to entry may, in the discretion of the Secretary of the Interior, be reappraised in the manner provided for in this Act.

Sec. 7. That from the proceeds arising from the sale and disposition of the lands aforesaid, exclusive of the customary fees and commissions, there shall be deposited in the Treasury of the United States, to the credit of the Indians belonging and having tribal rights on the said reservation, the sums to which the said tribe may be entitled, which shall draw interest at three per centum per annum; that the moneys derived from the sale of said lands and deposited in the Treasury of the United States to the credit

of the said Indians shall be at all times subject to appropriation by Congress for their education, support, and civilization.

Sec. 8. That sections sixteen and thirty-six of the land in each township within the tract described in section one of this Act shall not be subject to entry, but shall be reserved for the use of the common schools, and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose, and in case any of said sections, or parts thereof, are lost to said State by reason of allotments thereof to any Indian or Indians, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, within the area described in section one of this Act, to locate other lands not otherwise appropriated, which shall be paid for by the United States as herein provided, in quantity equal to the loss, and such selections shall be made prior

to the opening of such lands to settlement: Provided, That in any event not more than two sections shall be granted to the State in any one township, and lands must be selected in lieu of sections sixteen or thirty-six, or both, or any part thereof, within the townships in which the loss occurs, except in any townships where there may not be two sections of unallotted lands, in which event whatever is required to make two sections may be selected in any adjoining township.

Sec. 9. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of not more than one hundred and twenty-five thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the State of South Dakota, as provided in section eight of this Act. And there is hereby appropriated the further sum of thirty-five thousand dollars, or so much thereof as may

be necessary, for the purpose of making the appraisement, classification, and allotment provided for herein: Provided, That the latter appropriation, or any further appropriation hereafter made for the purpose of carrying out the provisions of this Act, shall be reimbursed to the United States from the proceeds from the sale of the lands described herein or from any money in the Treasury belonging to said Indian tribe.

Sec. 10. That the lands allotted, those retained or reserved, and the surplus land sold, set aside for town-site purposes, granted to the State of South Dakota, or otherwise disposed of, shall be subject for a period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country.

Sec. 11. That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described,

except sections sixteen and thirty-six, or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of the said lands, and to expend and pay over the proceeds received from the sale thereof only as received and as herein provided: Provided, That nothing in this Act shall be construed to deprive the said Indians of the Pine Ridge Indian Reservation of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this Act.

Approved, May 27, 1910.

APPENDIX L

Act of February 17, 1910, 36 Stat 196.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section seven and eight of the Act of May twenty-ninth, nineteen hundred and eight, entitled "An Act to authorize the sale and disposition of a portion of the surplus and unallotted lands in the Cheyenne River and Standing Rock Indian reservations in the States of South Dakota and North Dakota, and making appropriation and provision to carry the same into effect," are amended and as so amended are reenacted to read as follows:

Sec.7. That sections sixteen and thirty-six of the land in each township within the tract described in section one of this Act shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per

acre, and the same are hereby granted to the States of South Dakota and North Dakota for such purpose as the same are located in the said States, respectively; and in case any of said sections, or parts thereof, are lost to said States by reason of allotments thereof to any Indian or Indians, or otherwise, the governors of said States, respectively, with the approval of the Secretary of the Interior, are hereby authorized, within the area in the respective States described in section one of this Act, to locate other lands not occupied not exceeding two sections in any one township, which shall be paid for by the United States as herein provided, in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement.

Sec. 8. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of not more than four hundred and fifteen thousand dollars, or so much

thereof as may be necessary, to pay for the lands granted to the States of South Dakota and North Dakota, as provided in section seven of this Act. And there is hereby appropriated the further sum of seventy-five thousand dollars, or so much thereof as may be necessary, for the purpose of making the appraisement and classification and allotments provided for herein: Provided, That the latter appropriation, or any further appropriation hereafter made for the purpose of carrying out the provisions of this Act, shall be reimbursed to the United States from the proceeds received from the sale of the lands described herein or from any money in the Treasury belonging to said Indian tribes, respectively: And provided further, That the lands allotted, those retained or reserved, and the surplus lands sold, set aside for town-site purposes, or granted to the said States, or otherwise disposed of under the provisions of this Act, shall be subject for a period of twenty-five years to all the laws of the

United States prohibiting the introduction of intoxicants into the Indian country.

Approved, February 17, 1910.

APPENDIX M

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

JOHN BARTLETT,	)	CIV. NO. 82-3009
	)	
Petitioner,	)	
	)	
v.	)	ORDER
	)	
HERMAN S. SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY, AND MARK V. MEIERHENRY, ATTORNEY GENERAL, STATE OF SOUTH DAKOTA,	)	
	)	
Respondents.	)	

Upon the evidence and records on file, and for the reasons stated in the Court's memorandum opinion filed this date, it is

ORDERED that a writ of habeas corpus shall issue to respondents commanding the release of petitioner; this Order is stayed for thirty (30) days during which time respondents may file an

appeal, and if in fact an appeal is filed, this Order shall be further stayed pending the outcome of that appeal.

Dated April 19, 1982.

BY THE COURT:

/s/ DONALD J. PORTER
UNITED STATES DISTRICT JUDGE

ATTEST:

WILLIAM F. CLAYTON, CLERK

BY: /s/ JUDY L. HARVEY
Deputy

(SEAL OF COURT)

APPENDIX N

UNITED STATES DISTRICT COURT

FOR THE EIGHTH CIRCUIT

NO. 82-1582-SD JOHN BARTLETT, Appellee, v. HERMAN S. SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY, ET AL., Appellants.	)	SEPTEMBER TERM, 1982 JUDGMENT

This appeal from the United States District Court for the ----------District of South Dakota was considered on a designated record from the United States District Court and on briefs of the respective parties and was argued by counsel.

After consideration, it is order and adjudged that the judgment of the said District Court in

this cause be, and the same is hereby, affirmed in accordance with the opinion of this Court.

October 27, 1982

A True Copy:

ATTEST: Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit

Office-Supreme Court, U.S.
FILED
AUG 6 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-1253

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HERMAN S. SOLEM, WARDEN,
SOUTH DAKOTA STATE PENITENTIARY; and
MARK V. MEIERHENRY, ATTORNEY GENERAL,
STATE OF SOUTH DAKOTA,

Petitioners,

v.

JOHN BARTLETT,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 25, 1983
CERTIORARI GRANTED MAY 31, 1983

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RELEVANT DOCKET ENTRIES

Docket Entry	Date
Petition for Writ of Habeas Corpus filed	Feburary 9, 1982
Answer to Petition for Writ of Habeas Corpus filed	March 29, 1982
Decision by United States District Court for the District of South Dakota	April 19, 1982
Notice of Appeal filed	May 11, 1982
Petition for Hearing en banc filed	June 30, 1982
Order granting Petition for Hearing en banc	July 30, 1982
Oral argument before United States Court of Appeals for the Eighth Circuit	September 15, 1982
Decision by United States Court of Appeals for the Eighth Circuit	October 27, 1982

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Office-Supreme Court, U.S.
FILED
MAR 4 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1253

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

HERMAN S. SOLEM, etc., et al.,

Petitioner,

v.

JOHN BARTLETT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENT BARTLETT IN OPPOSITION

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February 1983

QUESTION PRESENTED

Did the Act of May 29, 1908, 35 Stat. 460, implicitly terminate federal court jurisdiction over major offenses by Indians occurring within the portions of the Cheyenne River Sioux and Standing Rock Sioux Reservations that the Act opened to non-Indian settlement?

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SUPPLEMENTAL STATEMENT OF THE CASE

Respondent Bartlett (who was petitioner below) pleaded guilty to a State charge of attempted rape on May 2, 1979. He was sentenced to ten years in the State Pentitentiary at Sioux Falls; including pretrial detention, about four years have been served.

The events that led to criminal charges against Bartlett occurred at Eagle Butte, South Dakota. As the State explains, the particular tract of land where these events took place was owned in unrestricted fee simple by a non-Indian. Bartlett is a member of the Cheyenne River Sioux Tribe, as is the complaining witness in his case.

Eagle Butte is in the portion of the Cheyenne River Reservation that was opened to non-Indian settlement by the Act

of May 29, 1908, 35 Stat. 460. Eagle Butte is also the capital and seat of government of the Cheyenne River Sioux Tribe. The Bureau of Indian Affairs Agency for the Tribe is located at Eagle Butte. According to the 1980 Census, Eagle Butte's population is about 78.5% Indian,[1/] and it includes large amounts of Indian trust land and federal Indian agency land.

The Treaty with the Sioux, June 29, 1868, 15 Stat. 635, reserved to the Sioux Nation a large area including all of what is now western South Dakota. The Act of March 2, 1889, 26 Stat. 888, ratified an agreement with the Sioux ceding much of

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1/ See U.S. Census Bureau, 1980 Census Summary Tape File 1-A (South Dakota) and 1980 Final Census Enumerated Districts Map (South Dakota), Enumerated Districts Nos. A1812-14, 1822-27.

the territory reserved in 1868 but reserving six separate reservations including the Cheyenne River and Standing Rock Reservations. The Act of May 29, 1908, supra, opened the western parts of both reservations to settlement by non-Indians. The eastern portion of the Standing Rock Reservation was opened to settlement by the Act of February 14, 1913, 37 Stat. 675. See United States v. Long Elk, 565 F.2d 1032 (8th Cir. 1977). Unsold lands from both openings were temporarily reserved in 1934 and restored to tribal ownership by orders of the Secretary of the Interior between 1941 and 1967.

SUMMARY OF ARGUMENT

1. Resolution of the conflict between the court below and the Supreme Court of South Dakota is not necessary. The principal matter dependent on the

Reservation's status is jurisdiction over serious crimes by Indians. Because of federal supremacy, the federal court's resolution of the issue is being and will be followed in practice.

2. The Court of Appeals' decision is consistent with this Court's decision in Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977). The Cheyenne River Reservation differs from the Rosebud Reservation in subsequent treatment of the opened area by the Interior Department and Congress, and there are crucial differences between the statute at issue here and those involved in Rosebud.

ARGUMENT

I. DESPITE DISAGREEMENT BETWEEN THE FEDERAL AND STATE COURTS, REVIEW BY THIS COURT IS UNNECESSARY.

The State correctly points out that the in banc decision of the Court of

Appeals in this case follows two prior panel decisions of the same court, but during the same period, the Supreme Court of South Dakota twice reached a contrary conclusion. Pet. 6-8.[2/] Nevertheless, resolution of this conflict is not of such importance that review by this Court in necessary.

Almost all jurisdictional disputes at Cheyenne River have arisen from felony criminal prosecutions. This has been the issue in five of the six cases cited by the State and in all other reported

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2/ The State further claims that prior to these cases there was solely state jurisdiction in the opened area "for over sixty years." Pet. 11. This unsupported assertion is not correct. The record includes references to two successful federal prosecutions of Indians for larceny in the opened area in 1928 and 1933. Appendix 96 to Hoxie Report. See Bartlett's motion to supplement the record filed July 1, 1982. In the decades prior to the recent cases, few Indians had legal counsel, and there are very few reported cases from the period.

cases on jurisdiction over the Reservation. Because of federal supremacy and the availability of habeas corpus under 28 U.S.C. § 2254, the Eighth Circuit's construction of the 1908 Act provides a practical, governing rule. (The Attorney General of South Dakota candidly acknowledged as much during oral argument to the Court of Appeals in this case.) Because the Court of Appeals' decision was in banc, that court's rule is obviously a stable one.

In the last few years, the United States Attorney has followed the Eighth Circuit's rule and has asserted federal jurisdiction over major crimes by Indians. See, e.g., United States v. Fay, 668 F.2d 375 (8th Cir. 1981) (bowling alley at Eagle Butte); United States v. Mound, 477 F. Supp. 156 (D.S.D. 1979) (Indian housing project at Eagle Butte). In

fact, one of the state court decisions relied on by the State here, State v. Janis, 317 N.W.2d 133 (S.D. 1982), actually was a case prosecuted by federal authorities in federal court. The offense involved was vehicular homicide within the same part of the Cheyenne River Reservation as the instant case. Mr. Janis was prosecuted by the United States Attorney and pleaded guilty to involuntary manslaughter. United States v. Janis, No. CR 80-30039-01 (D.S.D.). He was sentenced to the federal penitentiary. The South Dakota Supreme Court later decided that in its view he ought to have been prosecuted by the State instead, but his actual prosecution was by federal authorities.

The State's petition does not dispute these facts but asserts that review by this Court "is important to

the general public." Pet. 11. In reality the Reservation's status is important mostly to the Indians. Non-Indians are subject to federal Indian or tribal jurisdiction only when they commit federal crimes against Indians, sell liquor to them, lease Indian property, or have "some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." Montana v. United States, 450 U.S. 544, 566 (1981); Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978); United States v. Mazurie, 419 U.S. 544 (1975); Williams v. United States, 327 U.S. 711 (1946).

II. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH APPLICABLE DECISIONS OF THIS COURT.

The State's petition claims that the Court of Appeals' decision conflicts with prior decisions of this Court,

essentially with Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), affirming 521 F.2d 87 (8th Cir. 1975). The State then reviews alleged similarities between the Rosebud case and this one. But the State omits to mention three significant differences between the two cases.

First, this Court noted in Rosebud that "neither Congress nor the Department of Indian Affairs has sought to exercise its authority over this [opened] area" and that the area "is over 90% non-Indian, both in population and in land-use." 430 U.S. at 604-05. By way of contrast, the Cheyenne River Reservation has a different history. The opened area has an Indian majority, and it includes Eagle Butte, the tribal capital and Bureau of Indian Affairs agency head-

quarters for the Reservation. 3/

Most reported criminal charges against Cheyenne River Indians have arisen at Eagle Butte. The ruling sought by the State would impose a very impractical, "checkerboard" jurisdiction on the tribal capital, a point illustrated by the precise tract definition included in the State's petition. Pet. 3. This Court condemned a like proposal in Seymour v. Superintendent, 368 U.S. 351 (1962).

Second, the Rosebud Indians agreed to "cede, surrender, grant and convey to the United States all their claim, right, title, and interest" in part of their reservation. 430 U.S. at 591 n.8. This Court said this action and language were "precisely suited" to

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3/ The Treaty of June 29, 1868, supra, at art. 5, provides that BIA agents to the Sioux "shall reside among them."

"disestablishment" of the affected area. 430 U.S. at 592, quoting DeCoteau v. District County Court, 420 U.S. 425, 445 (1975). By contrast, the Cheyenne River Sioux made no such agreement, nor does such language appear in the Act of May 29, 1908.

Third, this Court in Rosebud relied on the Presidential Proclamation opening that reservation to settlement:

> . . . the said Indian tribe ceded, conveyed, transferred, relinquished, and surrendered, forever and absolutely, without any reservation whatsoever, expressed or implied . . . all their claim, title, and interest of every kind and character. . .

430 U.S. at 602 (emphasis by the Court). By contrast the Cheyenne River opening proclamation contained no such language and merely opened to settlement and entry "all the nonmineral, unalloted, unreserved lands within the Cheyenne River and Standing Rock Indian Reser-

vations. . ." Proclamation of Aug. 19, 1909, 36 Stat. 2500. The Secretary of the Interior implemented the proclamation by an order that referred to opening "the classified lands within" the two reservations. 38 Interior Dec. 160 (1909).

There are other differences as well. The State relies on the fact that the Rosebud statutes and the Act of May 29, 1908, both granted school lands to the State. But this Court in Rosebud relied not on the grant itself but on legislative history construing it. 430 U.S. at 600-01. The legislative history of the school lands grant in the Act of May 29, 1908, shows a different understanding that does not support the State's argument. See 42 Cong. Rec. 7005 (1908) (remarks of Rep. Hall of S. Dak.). School

lands without more do not indicate disestablishment. See United States v. Thomas, 151 U.S. 577 (1894) (alternative holding).

The State relies on the phrase "reservations thus diminished" in a proviso to section 2 of the 1908 Act. Pet. 18. The Court of Appeals held that this language is "subject to two competing constructions", one referring to boundaries as the State contends, the other referring to diminished tribal land holdings within unchanged boundaries. Condon v. Erickson, 478 F.2d 684, 687 (8th Cir. 1973). The court concluded that the State had not shown that its meaning was intended. The history of the 1908 Act in fact shows that the phrase referred only to reduced land holdings.

The 1908 Act's essential purpose was, of course, to acquire land from the tribes for sale to homesteaders, so the natural meaning of the phrase in context was a reference to reduced tribal ownership. Also, the 1908 Act reserved from opening and sale mineral lands in the opened area (see the Presidential Proclamation quoted above), and lands for "agency, school and religious purposes." 1908 Act §§ 1, 2, 35 Stat. at 461-62. Furthermore, a number of official references to the Reservation after 1908 made statements such as:

> The opening of the reservation has increased the need rather than diminished the necessity for Indian police in both open and diminished parts of the reservation. 4/

4/ Appendix C to brief of four counties as amici curiae, doc. no. 12 at sec. I, p. 1 (1911 Annual Report of the Cheyenne River Superintendent). See also id. doc. no. 30 at p. 12 (1914 Annual Report of the Superintendent).

The State also relies on a 1910 amendment to the 1908 Act, imposing federal Indian liquor laws for 25 years. Pet. 20. But the State incorrectly describes this provision as applicable only to the area opened under the 1908 Act. Rather, the 1910 amendment applied to all parts of the reservations, including lands "retained or reserved." Act of Feb. 17, 1910, 36 Stat. 196.

The State also draws the wrong inference about this statute's purpose. Controlling decisions of this Court from the same era held that unrestricted lands within Indian reservations were not subject to the existing federal Indian liquor prohibition laws. For example, in Clairmont v. United States, 225 U.S. 551 (1912), the Court voided a liquor violation conviction that had

occurred on unrestricted lands within the Flathead Reservation in Montana.[5/] The legislative history of the 1910 Amendment to the Cheyenne River statute shows an intent to make an exception to this judicial rule. H.R. Doc. No. 711, 61st Cong., 2d Sess. (1910).

Other subsequent statutes show a congressional understanding that these reservations continued to include the area opened in 1908. The Act of February 14, 1913, 37 Stat. 675, opened the eastern part of the Standing Rock Reservation. The Act provided for opening "all that portion of the Standing Rock Indian Reservation . . . within the following

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5/ That reservation has been held to be intact despite an "opening" law very similar in its terms to the Act of May 29, 1908. See Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982), cert. denied, 103 S.Ct. 314.

described boundaries, to wit . . . "
(emphasis added). There follows a
metes and bounds description of the
opened area comprising all of that
reservation not opened by the 1908 Act.
Plainly, the 1913 Congress understood
that the 1908 opened area was still
part of Standing Rock, else the 1913
Act would have simply opened all of
the reservation. Another reference
to the 1908 opened area as "within"
the Cheyenne River and Standing Rock
Reservations occurs in the Act of
Sept. 3, 1954, 68 Stat. 1191, Sec. I
and 68 Stat. at 1209-16.

CONCLUSION

For the reasons stated, the writ should be denied.

Respectfully submitted,

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Feb. 1983 Counsel for Respondent

Office Supreme Court, U.S.
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MAR 21 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-1253

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HERMAN S. SOLEM, WARDEN,
SOUTH DAKOTA STATE PENITENTIARY;
and
MARK V. MEIERHENRY, ATTORNEY GENERAL,
STATE OF SOUTH DAKOTA,

Petitioners,

v.

JOHN BARTLETT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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NO. 82-1253

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HERMAN S. SOLEM, WARDEN,
SOUTH DAKOTA STATE PENITENTIARY;
and
MARK V. MEIERHENRY, ATTORNEY GENERAL,
STATE OF SOUTH DAKOTA,

Petitioners,

v.

JOHN BARTLETT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The arguments and authorities which follow are submitted, pursuant to Rule 22.5 of the

Rules of the Supreme Court of the United States, in reply to the Respondent's Brief in Opposition to the Petition for Writ of Certiorari. Petitioners Solem and Meierhenry represent the State of South Dakota, and will hereinafter be referred to as "State." Respondent Bartlett will be referred to as "Bartlett." The Act of May 29, 1908, 35 Stat. 460, will hereinafter be referred to as "1908 Surplus Lands Act." References to the Petition for Writ of Certiorari, and the Respondent's Brief in Opposition to the Petition for Writ of Certiorari will be made by using the designation "Pet." and "Resp.," respectively, followed by the appropriate page number.

REASONS FOR GRANTING THE PETITION

I

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH A STATE COURT OF LAST RESORT.

A. Review by this Court is necessary to resolve the conflict between the South Dakota Supreme Court and the Court of Appeals.

Since 1973, there have been three decisions by the United States Court of Appeals for the Eighth Circuit and two decisions by the South Dakota Supreme Court involving the same question as is presented in this Petition. Bartlett v. Solem, 691 F.2d 420 (8th Cir. 1982) (en banc); United States v. Dupris, 612 F.2d 319 (8th Cir. 1979), vacated and remanded, 446 U.S. 980 (1980); United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973) [hereinafter referred to as "Erickson"]; State v. Janis, 317 N.W.2d 133 (S.D. 1982); Stankey v. Waddell, 256 N.W.2d 117 (S.D. 1977). The differences between these decisions are easily discernable: since 1973, the decisions by the Court of Appeals have uniformly held that Congress did not intend to diminish the Cheyenne River Reservation with the 1908 Surplus Lands Act; on the other hand, the South Dakota Supreme Court has uniformly held that the 1908 Surplus Lands Act diminished the Cheyenne River

Reservation, and that crimes committed on the lands opened to non-Indian settlement by that Act were within the criminal jurisdiction of the State of South Dakota. Bartlett, supra at 421; Dupris, supra at 320; Erickson, supra at 688-689; Janis, supra at 134-135; Stankey, supra at 127. Review by this Court is necessary to resolve this conflict.

Contrary to the claim made by Bartlett, the jurisdictional conflict presented in this Petition is one that is ripe for review by this Court. Bartlett suggests that the availability of habeas corpus relief, under 28 U.S.C. § 2254, is the answer to this problem. Resp. 6. The fact that there have been five decisions on the question presented in this Petition in the last ten years highlights the total lack of merit in such a claim. Until a decision is rendered by this Court, the jurisdictional problems, including "forum shopping" by Indian defendants, will continue.

The South Dakota Supreme Court has noted this problem on two different occasions and made the following observation:

> [Any confusion created by checkerboard jurisdiction] cannot compare with the confusion in determining criminal jurisdiction that has existed since Seymour [v. Superintendent, 368 U.S. 351, 83 S.Ct. 424, 7 L.Ed.2d 346 (1962)] with Indian defendants charged with a crime within the original boundaries of a reservation claiming federal jurisdiction if convicted in state courts and claiming state jurisdiction if convicted in federal courts.

Stankey, supra at 127. See also, Janis, supra at 134.

The procedural histories of the recent decisions dealing with the Cheyenne River Reservation support the South Dakota Supreme Court's concerns dealing with "forum shopping." One of these decisions, State v. Janis, supra, involved a two count complaint in state court charging Marvin Wayne Janis with second degree manslaughter. The charges arose from the killing of two people in an automobile accident which occurred on a highway in the area opened by the

1908 Surplus Lands Act. When he finally came before the state court on the complaint, Janis filed a Motion to Dismiss for want of state jurisdiction. After the state trial court granted this motion, the State was granted permission to pursue an intermediate appeal to the South Dakota Supreme Court.

In the meantime, Janis negotiated a plea agreement with the United States Attorney for the District of South Dakota in regard to the same incident. By pleading guilty to one count of involuntary manslaughter, a second count was dismissed. Janis then received a sentence of three years in the federal penitentiary. Interestingly, the United States Attorney for the District of South Dakota at that time is now Bartlett's counsel of record.

All of this federal activity took place after the Janis appeal had been briefed and argued in the South Dakota Supreme Court, but before a decision had been rendered by that court. In

fact, the State of South Dakota filed an amicus statement with the United States District Court asking for a delay in the plea and sentencing proceedings because of the pendency of the appeal in the South Dakota Supreme Court. The District Court ignored this request. A short time after the federal prosecution, the South Dakota Supreme Court reversed the state trial court's dismissal of the original state complaint against Janis.

Not only does this description of the federal prosecution of Marvin Wayne Janis differ significantly from Bartlett's description of the events (Resp. 6-7), but it also graphically illustrates the acute need for a decision by this Court interpreting the 1908 Surplus Lands Act which opened the Cheyenne River Reservation to settlement.

Resolution of the conflict between the interpretation of a Surplus Lands Act by the Court of Appeals and the South Dakota Supreme Court is

not without precedent. In DeCoteau v. District County Court, 420 U.S. 425 (1974), a conflict existed between the South Dakota Supreme Court and the United States Court of Appeals for the Eighth Circuit concerning the interpretation of an Act of Congress (Act of March 3, 1891, 26 Stat. 989), which opened reservation land within the Lake Traverse Reservation to settlement by non-Indians. In DeCoteau v. District County Court, 87 S.D. 555, 211 N.W.2d 843 (1973), the South Dakota Supreme Court held that the opening of the land to settlement diminished the reservation. In United States ex rel. Feather v. Erickson, 489 F.2d 99 (8th Cir. 1973), the Court of Appeals reached the opposite conclusion. This Court granted certiorari to resolve the conflict, DeCoteau v. District County Court, 417 U.S. 929 (1974), and later affirmed the South Dakota Supreme Court's decision. DeCoteau, 420 U.S. at 449.

The same considerations which led to this Court's decision to resolve the conflict in regard to the opening of the Lake Traverse Reservation are present in this matter. Because the present conflict between the South Dakota Supreme Court and the Court of Appeals is ripe for consideration by this Court, the State's Petition should be granted.

The conflict between the state courts and the federal courts has been intensified by the South Dakota Supreme Court's critical view of the Eighth Circuit's decision in Erickson, which is the ground work upon which its decisions in Dupris and Bartlett are built. See, Janis, supra at 137; Stankey, supra at 119. In both Janis and Stankey, the South Dakota Supreme Court found the analysis used in Erickson to be faulty. This criticism was based on the fact that the Court of Appeals did not have available for review subsequent decisions by this Court in DeCoteau, supra, and Rosebud Sioux Tribe v. Kneip, 430 U.S. 584

(1977), which had altered the legal analysis used in determining the proper interpretation of the various Surplus Lands Acts.

In both Janis and Stankey, the South Dakota Supreme Court supported its criticism with a detailed and exhaustive analysis of the 1908 Surplus Lands Act, the historical context surrounding the passage of the Act, the legislative history of the Act, and the subsequent administrative, executive, legislative and judicial actions relating to the Act. The thoughtful and well-reasoned opinions of not only the South Dakota Supreme Court in Janis and Stankey, but also United States District Judge Andrew Bogue's decision in United States v. A Juvenile, 453 F.Supp. 1171 (D.S.D. 1979), and Circuit Judge Theodore McMillian's dissent in Dupris, supra, which all conflict with the Eighth Circuit's opinions in Bartlett, Dupris and Erickson, deserve thcughtful and extensive review by this Court.

B. Jurisdictional status within the opened areas of the original Cheyenne River Reservation is an important question to all persons living within the affected areas.

Bartlett suggests that the jurisdictional status of the Cheyenne River Reservation is "important mostly to the Indians." Resp. 8. In reality, the jurisdictional status within the area of the original Cheyenne River Reservation opened to settlement by the 1908 Surplus Lands Act is important to anyone living on or near the original Reservation, especially as that status relates to effective and consistent law enforcement. Since 1973, the jurisdictional status of the opened area has been an unsolvable puzzle: jurisdiction seems to belong to any court other than the one in which the Indian defendant has been charged. Under such a system, neither federal nor state law enforcement officials can provide the type of law enforcement services demanded by both Indians and non-Indians living within the area

encompassing the original Cheyenne River Reservation.

Without a decision by this Court at this time, there will be no final resolution of the question presented in this Petition, thereby continuing the jurisdictional quagmire that presently exists within the original boundaries of the Cheyenne River Reservation. Bartlett argues, however, that even if certiorari is granted and this Court determines that Congress intended to diminish the original Cheyenne River Reservation, the jurisdictional nightmare on the Reservation will not be eliminated. Instead, Bartlett argues, the jurisdictional problems will continue because of the creation of so-called "checkerboard" jurisdiction. Resp. 10.

Under Bartlett's analysis, the imposition of "checkerboard" jurisdiction should be a negative factor in this Court's decision on whether or not

to grant certiorari review. He bases this conclusion on the assertion that "this Court condemned a like proposal [to impose "checkerboard" jurisdiction] in Seymour v. Superintendent, 368 U.S. 351 (1962)." Resp. 10.

It is true that this Court looks upon "checkerboard" jurisdiction with a certain amount of disfavor. See, Seymour, supra; Moe v. Salish and Kootenai Tribes, 425 U.S. 463 (1976). However, this Court has not avoided review of a jurisdictional question simply because a decision could create "checkerboard" jurisdiction. See, DeCoteau, supra; Rosebud Sioux Tribe, supra; and Washington v. Yakima Indian Nation, 439 U.S. 463 (1979). Chief Justice Francis Dunn of the South Dakota Supreme Court assessed the inherent problems of "checkerboard" jurisdiction in Stankey v. Waddell, supra. After reviewing the problems with such jurisdiction, he concluded:

> The finality of where jurisdiction belongs far outweighs any problems of

> determining whether a crime was committed on Indian allotments or on deeded land. The latter is simply a matter of proof. Further, the Supreme Court's recent ruling in Rosebud, which also results in such checkerboard jurisdiction, appears to us to mean that when there is unmistakeable congressional intent to alter a reservation boundary and provide for Indian allotments in the opened area, checkerboard jurisdiction is a necessary product.

Stankey, supra at 127 (citations omitted.) "Checkerboard" jurisdiction should not be an issue in this Petition: if Congress intended to diminish the Cheyenne River Reservation with the passage of the 1908 Surplus Lands Act, then that intent should be paramount.

The importance of the question presented in this Petition is further heightened by the fact that the Court of Appeals' decision in Erickson, supra, reversed a settled legal determination, originally set forth in United States v. LaPlant, 200 F. 92 (D.S.D. 1911), which stated that South Dakota's state courts had criminal jurisdiction within the area of the original Cheyenne River

Reservation opened to settlement by the 1908 Surplus Lands Act. The first criticism of that settled rule came in Judge Lay's dissent in United States ex rel. Miner v. Erickson, 428 F.2d 623 (8th Cir. 1970). Because of the break in the continuum of jurisdiction created by the Erickson decision, the question presented in this Petition is one of great importance to the State of South Dakota, the affected counties, the Cheyenne River and Standing Rock Sioux Tribes, and the general public living within the area in question. The jurisdictional question presented herein should be heard and decided by this Court.

II

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The Court of Appeals decision in this matter relies on the court's earlier decisions in Erickson, supra and Dupris, supra. The greatest reliance

is placed on Erickson. Erickson, however, was decided prior to this Court's decisions in Rosebud Sioux Tribe, supra, and DeCoteau, supra. The Court of Appeals' analysis in Erickson necessarily failed to properly examine the factors set forth in these more recent decisions of this Court dealing with the diminishment of Indian reservations.

Bartlett claims that several differences between the situation found in the opening of the Cheyenne River Reservation and the opening of the Rosebud Reservation, which was analyzed in Rosebud Sioux Tribe, supra, support the Court of Appeals' decision in this matter. Resp. 9-17. A close analysis of Bartlett's argument, however, shows that Bartlett is arguing that Rosebud Sioux Tribe, supra, was incorrectly decided by this Court.

One example that illustrates this point is Bartlett's reference to the State's reliance on the 1910 amendment (Act of February 17, 1910, 36

Stat. 196) to the 1908 Surplus Lands Act as support for the claim that the Erickson analysis was incomplete. Resp. 15. However, in Rosebud Sioux Tribe, this Court reviewed identical language, and concluded that the inclusion of the prohibition language supported the argument that the opened area was no longer reservation. This Court stated:

> [T]he most reasonable inference from the inclusion of this provision [concerning prohibition of intoxicants on surplus lands] is that Congress was aware that the opened, unallotted areas would henceforth not be "Indian country," because not in the reservation.

Rosebud Sioux Tribe, 430 U.S. at 613. The Court of Appeals in Erickson did not even address this argument, Erickson, supra at 688-689. See also, 36 Stat. 196, 197 [Pet., Appendix L, pp. A94-95] (language of the 1910 amendments); 36 Stat. 448, 451 [Pet., Appendix J, p. A76] (language in the 1910 Act of Congress which opened the Rosebud Reservation).

Bartlett's attack of the State's review of the shortcomings and inconsistencies of the Court of Appeals' analysis in Erickson directly conflicts with this Court's decision in Rosebud Sioux Tribe. If Bartlett's argument is correct, the underlying principles in Rosebud Sioux Tribe are invalid. Bartlett's arguments, however, are not correct. On the contrary, the Court of Appeals has interpreted the 1908 Surplus Lands Act dealing with the Cheyenne River Reservation in a way which conflicts with this Court's decisions in DeCoteau and Rosebud Sioux Tribe. Review by this Court is necessary.

CONCLUSION

As the chief law enforcement officer of the State of South Dakota, the Attorney General is bound to uphold the Constitution and legal authority of the State of South Dakota. Because the Court of Appeals determination as to jurisdiction on the original Cheyenne River Reservation

is incorrect, and because the South Dakota Supreme Court has twice, within the last six years, issued a mandate to the State of South Dakota as to the proper scope of the State's jurisdiction within the area of the original Cheyenne River Reservation opened by the 1908 Surplus Lands Act, South Dakota law enforcement officials must consider the area in question to be within the criminal jurisdiction of the State of South Dakota. This position creates a conflict which can be resolved only by a decision of this Court. Certiorari review should be granted.

Based on the foregoing arguments and authorities, and on the arguments and authorities presented in the Petition for Writ of Certiorari, the Petitioners Herman S. Solem, Warden, South Dakota State Penitentiary, and Mark V. Meierhenry, Attorney General for the State of South Dakota, pray that their Petition for Writ of

Certiorari to the United States Court of Appeals for the Eighth Circuit be granted.

Respectfully submitted,

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NO. 82-1253

IN THE

Supreme Court of the United States

October Term, 1982

HERMAN SOLEM, *et al.*,

Petitioners,

v.

JOHN BARTLETT,

Respondent.

On Petition for A Writ of Certiorari to
The United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE COUNTIES OF DEWEY, ZIEBACH, AND CORSON, SOUTH DAKOTA; COUNTIES OF SIOUX AND MOUNTRAIL, NORTH DAKOTA; COUNTY OF LAKE, MONTANA; COUNTY OF MAHNOMEN, MINNESOTA; COUNTIES OF DUCHESNE AND UINTAH, UTAH, AS AMICI CURIAE IN SUPPORT OF PETITION

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INTEREST OF THE AMICI COUNTIES

The counties joining in this brief all contain areas that were at one time established as Indian reservations, but which were the subject of surplus lands statutes similar to the one at issue in this case.[1] The question of whether those areas continue

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1. Most of these areas have been the subject of decisions holding that their reservation status was not terminated. E.g., Bartlett v. Solem, 691 F.2d 420 (Dewey, Ziebach, Corson and Sioux Counties); White Earth Band of Chippewa Indians v. Alexander, 683 F.2d 1129 (8th Cir.), cert. denied, _____ U.S. _____, 103 S.Ct. 489 (Mahnomen County); Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir.), cert. denied sub nom. City of Polson v. Confederated Salish and Kootenai Tribes, _____ U.S. _____, 103 S.Ct. 314 (1982) (Lake County); Ute Indian Tribe v.Utah, 521 F. Supp. 1072 (D. Utah 1981), appeal pending No. 81-1901 (10th Cir.) (Duchesne and Uintah Counties); City of New Town v. United States, 454 F.2d 121 (8th Cir. 1972) (Mountrail County). The counties submit that in light of DeCoteau v. District County Court, 420 U.S. 425 (1975) and Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), these cases were incorrectly decided.

as reservations today is of great importance to the counties, because the resolution of the question of reservation status significantly affects the extent to which the states and their political subdivisions may exercise governmental authority within those areas. Thus, the principles and guidelines used by the courts in resolving questions of this type are of paramount concern to the amici counties.

In addition, the Counties of Dewey, Ziebach, Corson, and Sioux have a special interest in the outcome of this case. These four counties are included within the original boundaries of the two reservations affected by the 1908 Act of Congress at issue in this case, and each county contains a part of the area opened to settlement under

the Act.[2] A finding that the opened areas remain within the boundaries of the two reservations will divest the states and counties of much of their civil, criminal, administrative, and regulatory jurisdiction within those areas. [3] See, e.g., DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975); McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973).

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2. This case centers on the status of the opened lands originally within the Cheyenne River Reservation in South Dakota. However, it necessarily affects as well the status of lands originally within the Standing Rock Reservation in North and South Dakota which were also opened under the 1908 Act. Dewey and Ziebach Counties lie within the original boundaries of the Cheyenne River Reservation, and Corson and Sioux Counties lie within the original boundaries of the Standing Rock Reservation.

3. For these reasons, these counties joined in a similar amicus brief filed by the State of South Dakota in United States v. Dupris, 446 U.S. 980 (1982).

STATEMENT OF THE CASE

The amici curiae adopt the Statement of the Case set forth in the Petition for a Writ of Certiorari. In addition, the counties include the following historical background to the issue presented by this case.

The original Cheyenne River Reservation was established by Section 4 of the Act of March 2, 1889, 25 Stat. 888, 889. At that time, the reservation consisted of some 2.9 million acres of land in western South Dakota. See, e.g., United States ex rel. Condon v. Erickson, 478 F.2d 684, 685 (8th Cir. 1973). In 1908, following consultations between the federal government and the Cheyenne River Sioux Tribe, Congress enacted the statute in question, which directed the Secretary of the Interior to "sell and dispose of" the unallotted lands in portions of both the Cheyenne River Reservation and the adjacent Standing Rock Reservation in

North Dakota and South Dakota. Act of May 29, 1908, 35 Stat. 460 (Pet. App. D, pp. A14-A29.) Pursuant to the provisions of the Act, an area consisting of the western portions of the two reservations and an area along both sides of their mutual east-west boundary - amounting to a little over half of the original acreage of the reservations - was opened to settlement in 1910. See S. Rep. No. 439, 60th Cong., 1st Sess. at 4 (1908); Presidential Proclamation of August 10, 1909, 36 Stat. 2500.

It is important to note that this jurisdictional dispute essentially involves the opened and unrestored lands within the original reservation boundaries. There is no dispute over the fact that the unopened portion of the reservation, together with the lands later restored to reservation

status,[4] presently exist as an Indian reservation. There is also no dispute that individual Indian allotments held in trust by the federal government are "Indian country" by virtue of 18 U.S.C. § 1151(c). Thus, the lands actually at issue are primarily those owned by non-Indians.

ARGUMENT

I. THIS CASE REPRESENTS A CONFLICT BETWEEN THE FEDERAL AND STATE COURTS

As noted in the Petition, the en banc decision of the court below is in direct

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4. Following the passage of the Indian Reorganization Act in 1934, a substantial amount of land in the opened area was restored to tribal ownership and reservation status by the Secretary of the Interior under Sections 3 and 7 of the Act, 25 U.S.C. §§ 463 and 467. Order of Restoration, June 12, 1941, 6 Fed. Reg. 3300; Order of Restoration, January 10, 1949, 14 Fed. Reg. 471; Order of Restoration, January 21, 1952, 17 Fed. Reg. 1065; Order of Restoration, May 17, 1957, 22 Fed. Reg. 3693.

opposition to the recent unanimous decision of the Supreme Court of South Dakota in State v. Janis, 317 N.W.2d 133 (S.D. 1982). To better understand this conflict, it is useful to review the history of the numerous judicial decisions regarding the issue presented by this case. In 1911, shortly after the 1908 Act had taken effect, the United States District Court for South Dakota held that the Act had the effect of reducing the reservation boundaries by excluding the area opened to settlement. United States v. La Plant, 200 F. 92 (D.S.D. 1911). This decision was cited with approval by the Eighth Circuit Court of Appeals on at least two occasions. Kills Plenty v. United States, 133 F.2d 292, 294 (8th Cir.), cert. denied, 319 U.S. 759 (1943); Beardslee v. United States, 387 F.2d 280, 286 (8th Cir. 1967) (Blackmun, J.). The interpretation in La Plant was also accepted by the

state Supreme Court in three separate decisions over the years. State v. Barnes, 81 S.D. 511, 137 N.W.2d 683 (1965); Lafferty ex rel. State v. Jameson, 80 S.D. 411, 125 N.W.2d 171 (1963); State v. Sauter, 48 S.D. 409, 205 N.W. 25 (1925).

There was thus no conflict of decision for over sixty years, and the prevailing state of the law in both federal and state courts was that the 1908 Act had diminished the size of the Cheyenne River Reservation. However, in 1972, one judge of the federal District Court, following a suggestion made in a dissent in United States ex rel. Miner v. Erickson, 428 F.2d 623, 627 n.11 (8th Cir. 1970) (Lay, J., dissenting), concluded that the opened portion of the Cheyenne River Reservation was not disestablished by the 1908 Act. United States ex rel. Condon v. Erickson, 344 F. Supp. 777 (D.S.D. 1972).

The Eighth Circuit agreed, effectively reversing the previously established precedent. United States ex rel. Condon v. Erickson, (hereinafter "Erickson") 478 F.2d 684 (8th Cir. 1973).

Further illumination of this area of the law was subsequently provided by this Court in DeCoteau v. District County Court, 420 U.S. 425 (1975) and Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977). In light of these decisions, the state Supreme Court re-examined the 1908 Act and concluded that it had disestablished the affected portion of the reservation. Stankey v. Waddell, 256 N.W.2d 117 (S.D. 1977). The District Court undertook a separate analysis of the question and came to the same conclusion. United States v. A Juvenile, 453 F. Supp. 1171 (D.S.D. 1978). However, the Eighth Circuit adhered to its earlier decision in Erickson and reversed the District Court over a

vigorous dissent by Judge McMillian. United States v. Dupris, 612 F.2d 319 (8th Cir. 1979). That judgment was later vacated by this Court. 446 U.S. 980 (1980).

In 1982, the South Dakota Supreme Court declined to follow Dupris, finding its reasoning unpersuasive, and again held that the 1908 Act did have the effect of disestablishment. State v. Janis, 317 N.W.2d 133 (S.D. 1982). The most recent development in this tortuous chronology has been the split en banc decision of the Eighth Circuit in the instant case, which reaffirmed Erickson and Dupris.[5] These two recent decisions are unequivocal and irreconcilable, and create the same sort of conflict between the federal and state courts which led this Court to grant certiorari in

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5. Two of the seven judges of the Court dissented, believing that Erickson required modification in light of Rosebud and DeCoteau.

DeCoteau v. District County Court, 420 U.S. 425, 430-31 (1975). Because of the extensive effect of reservation status on state and local jurisdiction, this conflict has resulted in jurisdictional chaos for the area, which will continue until the matter can be finally resolved by this Court.

II. THE DECISION OF THE COURT BELOW IS REPRESENTATIVE OF THE PRESENT CONFUSION REGARDING AN ISSUE OF NATIONAL IMPORTANCE

Surplus lands acts which, like the 1908 Cheyenne River Act, opened reservation lands for non-Indian settlement, have been the subject of much litigation in recent years. See, e.g., White Earth Band of Chippewa Indians v. Alexander, 683 F.2d 1129 (8th Cir.), cert. denied, ____ U.S. ____, 103 S.Ct. 489 (1982); Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir.), cert. denied sub nom. City of Polson v. Confederated Salish and Kootenai Tribes, ____ U.S. ____, 103 S.Ct. 314 (1982); Russ v. Wilkins, 624 F.2d 914 (9th Cir. 1980),

cert. denied, 451 U.S. 908 (1981); Red Lake Band of Chippewa Indians v. Minnesota, 614 F.2d 1161 (8th Cir.), cert. denied, 449 U.S. 905 (1980); United States v. Dupris, 612 F.2d 319 (8th Cir. 1979), vacated mem., 446 U.S. 980 (1980); United States v. Long Elk, 565 F.2d 1032 (8th Cir. 1977); Ute Indian Tribe v. Utah, 521 F. Supp. 1072 (D. Utah 1981), appeal docketed, No. 81-1901 (10th Cir.). Despite the principles announced by this Court in Rosebud and DeCoteau, supra, no consistent application of those principles has emerged. Instead, confusion has persisted concerning the interpretations of these statutes and their histories. Although the Rosebud and DeCoteau decisions appear to be plain enough, the analysis of those cases has been obscured or ignored in subsequent decisions. This problem of interpretation is of nationwide significance because of the many such surplus

lands statutes, involving millions of acres, which were enacted in the late nineteenth and early twentieth centuries. Further guidance from this Court is therefore needed to clarify the principles announced in DeCoteau and Rosebud and to resolve the continuing confusion in this important area of the law.

This uncertainty in interpretation is perhaps best illustrated by the recent decisions of the Eighth Circuit. Before this Court's decision in DeCoteau, the Eighth Circuit had held that three different surplus lands statutes did not have the effect of disestablishment. City of New Town v. United States, 454 F.2d 121 (8th Cir. 1972); Erickson, supra; United States ex rel. Feather v. Erickson, 489 F.2d 99 (8th Cir. 1973), rev'd sub nom. DeCoteau v. District County Court, 420 U.S. 425 (1975). Following this Court's reversal of the

Feather decision, the Eighth Circuit twice held statutes of this era to have disestablishment effect. Rosebud Sioux Tribe v. Kneip, 521 F.2d 87 (8th Cir. 1975), aff'd, 430 U.S. 584 (1977); United States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977). Since then, however, the court's decisions have taken a sharply different tack. Apparently viewing Rosebud and Cook as aberrations, the court has three times disregarded these decisions and reached back to its earlier decisions for guidance in finding an absence of disestablishment intent in statutes strikingly similar to those construed in Rosebud and Cook. United States v. Long Elk, 565 F.2d 1032 (8th Cir. 1977); United States v. Dupris, 612 F.2d 319 (8th Cir. 1979), vacated mem. 446 U.S. 980 (1980); Bartlett v. Solem, 691 F.2d 420 (8th Cir. 1982).

III. THIS CASE REPRESENTS A CONFLICT BETWEEN THE DECISIONS OF THIS COURT AND THE EIGHTH CIRCUIT

A. The Court Below Failed To Use The Detailed Analysis Mandated By This Court.

In two relatively recent cases, this Court has outlined the proper judicial approach to questions of Indian reservation disestablishment. See Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District County Court, 420 U.S. 425 (1975). As specified by this Court, the requisite analysis involves an examination of several factors: the face of the Act at issue, its legislative history and surrounding circumstances, and its subsequent treatment by courts and government officials. Rosebud at 587, 603; DeCoteau at 442, 444. In its decision below, the Court of Appeals did not engage in the comprehensive analysis

required by Rosebud and DeCoteau, but instead relied solely on its earlier decisions in Dupris, supra, Erickson, supra, and Long Elk, supra, 565 F.2d 1032 (8th Cir. 1977). 691 F.2d at 421.

Of these decisions, however, Erickson is the only one in which the Eighth Circuit undertook an independent examination of the effect of the 1908 Cheyenne River Act.[6] The decision in Erickson, however, predated both Rosebud and DeCoteau, and relied on narrow and outdated principles which have been discredited in subsequent decisions. Lacking the guidance of the above cases, the Erickson

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6. In Dupris, the court did not make an independent examination of the 1908 Act, but instead held that the result was controlled by Erickson and other decisions. The majority's discussion was limited to a brief response to the arguments raised in Judge McMillian's thorough dissent. Id at 321-23. In Long Elk, which involved a different surplus lands statute, the court simply stated as dictum that it adhered to the decision in Erickson. 565 F.2d at 1036

court based its decision on what it termed "traditional methods of statutory construction" and overlooked or misinterpreted many factors whose significance has since been made clear in DeCoteau, Rosebud, and other more recent decisions. Despite these shortcomings, the Court of Appeals has repeatedly relied on Erickson and has declined to fully reexamine its continuing validity.[7]

B. The Decision Of The Court Below Is Inconsistent With The Decisions Of This Court.

In Rosebud, this Court held that three separate statutes which opened portions of the original Rosebud Reservation to non-Indian settlement all had the effect of

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7. In contrast, both the federal District Court and the South Dakota Supreme Court have reexamined Erickson and have found that it does not withstand scrutiny. United States v. A Juvenile, supra, 453 F. Supp. at 1201; State v. Janis, supra, 317 N.W. 2d at 137; Stankey v. Waddell, supra, 256 N.W. 2d

disestablishing the portions opened. All three were unilateral acts of Congress which, like the 1908 Cheyenne River Act, provided for the settlement of the lands under the homestead laws and the collection by the federal government of revenues from the sales of the lands, to be held in trust for the Tribe. Act of April 23, 1904, 33 Stat. 254 (Pet. App. H, pp. A43-A53); Act of March 2, 1907, 34 Stat. 1230 (Pet. App. I, pp. A54-A63); Act of May 30, 1910, 36 Stat. 448 (Pet. App. J, pp. A64-A77). One of these - the 1904 Act - was preceded by a cession agreement which was unilaterally modified by Congress, while the 1907 and 1910 Acts did not purport to incorporate cession agreements but, like the 1908 Cheyenne River Act, simply provided for the opening of the lands.

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at 120, 124, 127.

The 1908 Cheyenne River Act is nearly identical to the 1907 and 1910 Rosebud Acts - a side-by-side comparison reveals only trivial differences among the three.[8] There is nothing in the text of the Cheyenne River Act, is legislative history, or the surrounding circumstances, to indicate that it was intended to have an effect any different from that of the three contemporaneous statutes opening the Rosebud Reservation.[9]

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8. The 1908 Act is also virtually identical to the 1910 Act which opened a portion of the Pine Ridge Reservation in South Dakota. Act of May 27, 1910, 36 Stat. 440. The Pine Ridge statute has also been held to have the effect of disestablishment. United States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977).

9. The Cheyenne River Act, like the Rosebud Acts, was sponsored in the Senate by Senator Gamble of South Dakota, in response to the "familiar forces" described in Rosebud, 430 U.S. at 590, 606, 609. United States v. A. Juvenile, supra, 453 F. Supp. at 1176-77. All three statutes were presented to the respective tribes by Inspector

Because there are no logical grounds for distinction among the three statutes, this Court's decision in Rosebud must control.[10] The decisions of the Eighth Circuit on this question and the decision of this Court in Rosebud are thus in direct and irreconcilable conflict.

To allow this situation to persist undermines the authority of this Court and

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James McLaughlin, who was directed in regard to the Cheyenne River Act to follow the instructions given him as to the 1907 Rosebud Act. See United States v. Dupris, supra, 612 F.2d at 329-30 (McMillian, J., dissenting).

10. The Eighth Circuit in its opinion in Dupris, did not attempt to distinguish the obviously pertinent decision in Rosebud, and referred to Rosebud only for the general principles of construction applicable to such cases. Nevertheless, the court below in the instant case stated that Rosebud was "thoroughly analyzed" in Dupris. While this may well be so, such an analysis is not articulated in the court's opinion in Dupris, and would seem to have been obviated in that case by the court's initial determination that the case was "controlled" by other

erodes the principles laid down in Rosebud. This case may therefore be appropriate for summary reversal of the decision below on the petition, or for vacation and remand in view of Rosebud. See Appawora v. Brough, 431 U.S. 901 (1977).

IV. THE DECISION OF THE COURT OF APPEALS DISREGARDS MANIFEST EXPRESSIONS OF CONGRESSIONAL INTENT IN A MANNER INCONSISTENT WITH THE HOLDINGS OF THIS COURT

A. Congressional Intent To Disestablish Is Plain On The Face Of The Act.

It must be remembered that in determining questions of reservation disestablishment, the intent of Congress controls. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586 (1977); DeCoteau v. District County Court, 420 U.S. 425, 442, 444 (1975). Although the opening of reservation lands to settlement by "sell and dispose" language such as that used in the 1908 Act may not

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opinions. 612 F.2d at 320.

by itself result in disestablishment, e.g. Rosebud, 430 U.S. at 586-87, reservation status does not survive an opening where, as in Rosebud, congressional intent to disestablish is otherwise apparent. Id. at 586-87. As outlined in the Petition, such an intent with respect to the 1908 Cheyenne River Act is evident on the face of the Act and is confirmed by its legislative history, its historical circumstances, and the subsequent jurisdictional history of the area in question.

1. "Reservations Thus Diminished."

One reflection of this intent is a provision of Section 2 which permitted those Indians who had taken allotments of land in the area to be opened to exchange their lands for tracts selected "within the respective reservations thus diminished." 35 Stat. at 461 (Pet. App., p. A18) (emphasis added). The use of the word "diminished" is an

unambiguous indication that the Act was intended to reduce the size of the reservation by altering its boundaries. See, e.g., United States v. Wounded Knee, 596 F.2d 790, 792-95 (8th Cir.), cert. denied, 442 U.S. 921 (1979); United States ex rel. Cook v. Parkinson, 525 F.2d 120, 122-23 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977); Rosebud Sioux Tribe v. Kneip, 521 F.2d 87, 111-12 (8th Cir. 1975), aff'd, 430 U.S. 584 (1977); Lower Brule Sioux Tribe v. South Dakota, 540 F. Supp. 276, 281 (D.S.D. 1982); United States v. A Juvenile, 453 F. Supp. 1171, 1190 (D.S.D. 1978), rev'd sub nom. United States v. Dupris, supra; State v. Janis, 317 N.W.2d 133, 136 (S.D. 1982); Stankey v. Waddell, 256 N.W.2d 117, 120 (S.D. 1977). See also Rosebud, 430 U.S. at 613-14 (similar provision highly persuasive); Seymour v. Superintendent, 368 U.S. 351, 354 (1962); Confederated Salish and Kootenai

Tribes v. Namen, 655 F.2d 951, 955 (9th Cir.), cert. denied sub nom. City of Polson v. Confederated Salish and Kootenai Tribes, ____ U.S. ____, 103 S.Ct. 314 (1982).

In Erickson,[11] the court below suggested that the phrase "reservations thus diminished" might not refer to the diminution of the reservation boundaries, but to a reduction of the acreage of Indian landholdings in the area. 478 F.2d at 687. Not only does this interpretation ignore both the logical sense of the phrase and the history of the Act, but it has been decisively laid to rest by subsequent decisions of the Eighth Circuit. See United States v. Wounded Knee, 596 F.2d 790, 792-95 (8th Cir.), cert. denied, 442 U.S. 921

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11. Because the court in the case at hand relied wholly on its previous decision in Dupris, Long Elk, and Erickson, it is the reasoning of those cases which is at issue here.

(1979); Rosebud, supra, 521 F.2d at 99, 111. In Wounded Knee, for example, the court found similar wording in a 1954 statute to be a "crucial phrase" which Congress used to explicitly reduce the boundaries of the Cheyenne River Reservation.

2. "Public Domain".

Another relevant provision of the 1908 Act is Section 9 which, inter alia, provided that Indians residing in certain townships in the area to be opened retained a right to take timber in those townships for domestic purposes "only as long as the lands remain part of the public domain." 35 Stat. at 464 (Pet. App., p. A29) (emphasis added). Clearly, the Act contemplated that the opened lands were to be restored to the public domain, and the decisions of this Court have recognized that restoration to the public domain is synonymous with disestablishment. Rosebud, 430 U.S. at 589

n.5; DeCoteau, supra, 420 U.S. at 426-27, 446, 448-49; Seymour v. Superintendent, supra, 368 U.S. at 358 (1962). The use of the term "public domain" in the 1908 Act is thus an unequivocal indication of an intent to disestablish. Stankey v. Waddell, supra, 256 N.W.2d at 126-27.

The court below discounted the public domain language in Section 9, suggesting that Congress may have intended that only the townships referred to in that proviso were to be restored to the public domain. Erickson, 478 F.2d at 687-88. This suggestion ignores the logic of the language used in Section 9, which clearly indicates that this proviso did not by itself restore lands to the public domain but instead referred to a restoration occurring elsewhere in the Act - i.e., the sections providing for sale and disposal of the unallotted lands. There is no indication

in the Act or its legislative history that the restoration was restricted to the area referred to in Section 9, or that the disposition of those lands was to proceed any differently from that of other lands in the opened area. See A Juvenile, supra, 453 F. Supp. at 1194; 56 I.D. 330, 338 (1920); 45 Cong. Rec. 739 (1910).

3. School Lands.

Further confirmation of disestablishment intent is found in the "school lands" provision of Section 7, which specified that the sixteenth and thirty-sixth sections of each township were not to be subject to homestead entry but instead were to be granted to the States for school purposes. 35 Stat. 463 (Pet. App., pp. A25-A26). The significance of such a provision has been fully explained by this Court in Rosebud with regard to virtually identical provisions in the three Rosebud Acts. 430 U.S. at 599-

601, 608 n.36. Just as in Rosebud, it is clear that Congress included this provision in order to implement a grant to the states which was made under the states' Enabling Act but deferred until the reservation was "extinguished" and restored to the public domain. See A Juvenile, supra, 453 F. Supp. at 1192; 42 Cong. Rec. 7005 (1908); 45 Cong. Rec. 738-39 (1910). However, without discussing the explanation in Rosebud, the court below dismissed the school lands provision, intimating that it was of "minimal importance." Dupris, 612 F.2d at 321.

4. Intoxicants Provision.

Another pertinent section of the 1908 Act is a provision in Section 8, added by amendment in 1910, which prohibited the introduction of intoxicating liquors into the opened area for a period of twenty-five years. Act of February 17, 1910, 36 Stat.

196. This provision is identical to a provision in the Rosebud Act of the same year, which the Court interpreted to "reflect strongly" an intent to disestablish. 430 U.S. at 613-14. As explained in Rosebud, because there was already an existing statutory ban on the introduction of intoxicants into Indian country, the "most reasonable inference" from the inclusion of this provision is that Congress understood that the opened areas would no longer be part of the reservation. Rosebud at 613. Nevertheless, the Eighth Circuit found that the provision should be given "very little weight," apparently reasoning that Congress could have believed the amendment to be surplusage, but added it anyway at the request of the Indians. Dupris at 321. However, this assertion finds no suport in the

legislative history,[12] which instead clearly reflects an understanding on the part of Congress that the federal laws prohibiting liquor sales in Indian country would not apply without the amendment. 45 Cong. Rec. 1769-70 (1910). See also A Juvenile, supra, at 1197-98; H.R. Doc. No. 711, 61st Cong., 2d Sess. (1910). Thus, the liquor law extension, like the other statutory provisions, supports the conclusion that the 1908 Cheyenne River Act was intended to disestablish the portion of the original reservation opened by the Act.

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12. The legislative history cited by the United States, from which the court's conclusion is derived, does not pertain to the 1910 amendment, but instead to a report of a separate, unsuccessful bill aimed at the opening of the diminished reservation left unopened by the 1908 Act. See S.Rep. No. 518, 61st Cong., 2d Sess. at 4-5 (1910). The materials pertinent to the 1910 amendment make no reference to a request by the Tribes.

B. The Legislative History of the 1908 Act and the Surrounding Circumstances Confirm that Congress Intended to Disestablish the Areas to be Opened.

In 1907, the "familiar forces" described in DeCoteau and Rosebud began to work on the Cheyenne River and Standing Rock Reservations, pressing for an opening of the surplus lands of the reservations for non-Indian settlement. United States v. A Juvenile, supra, 453 F. Supp. at 1176-77. In December 1907, Senator Gamble of South Dakota introduced a bill to open parts of the two reservations (S. 1285, 60th Cong., 1st Sess. (1907)), and the Commissioner of Indian Affairs directed Indian Inspector James McLaughlin to proceed to the two reservations to explain the proposal to the Indians and to solicit their views, as he had with respect to the 1907 Rosebud Act. Dupris, 612 F.2d at 329-30 (McMillian, J., dissenting). A Juvenile at 1177-78.

The materials surrounding Inspector McLaughlin's councils with the Indians clearly indicate that both the Inspector and the Indians understood that an opening of portions of the two reservations would result in disestablishment. Both McLaughlin and the Indians at both reservations referred to the proposed opening in terms of cession, relinquishment, and reduction of the reservations, and described the portion to be left unopened as a "diminished reservation." S. Rep. No. 439, 60th Cong., 1st Sess., pt. 2 at 5-13 (1908); H.R. Rep. No. 1539, 60th Cong., 1st. Sess. at 9-17 (1908). See also A Juvenile at 1179-83. Equally explicit is McLaughlin's written report of these conferences, which contains numerous references to new boundary lines, diminished reservations, and the cession and relinquishment of lands, and leaves no doubt as to the commonly understood effect of the

opening legislation. S. Rep. No. 439, supra, pt. 2 at 1-4; H.R. Rep. No. 1539, supra at 5-8.

Curiously, the court below found the statements in McLaughlin's report to be "ambiguous" because the Indians were in an "inferior bargaining position," and found further ambiguity in the fact that McLaughlin sometimes referred to the disposal of the lands as an "opening." Dupris at 321-22. First, however, it is not readily apparent what effect the position of the Indians would have on the clarity of McLaughlin's otherwise unambiguous statements. Second, this Court in Rosebud has made it clear that "opening" and "disestablishment" are not mutually

exclusive terms and that disestablishment may in fact result from an opening.[13]

Inspector McLaughlin's report, together with the transcript of his councils with the Indians, was included in the committee reports of both the Senate and House as a supplementary report and his understanding of the bill was thus evidently shared by the committees. S. Rep. No. 439, supra, pt. 2; H.R. Rep. No. 1539, supra at 5-28. The committee's perception of the

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13. The Eighth Circuit in Dupris emphasized the absence of any cession agreement with the Indians, a factor which it apparently believed to be of substantial importance. 612 F.2d at 322. Rosebud, however, leaves no doubt that Congress knew it could unilaterally terminate reservation status and that the presence or absence of Indian consent is therefore not dispositive. 430 U.S. at 587-88, 598 and n.20. In this respect, the circumstances of the 1908 Cheyenne River Act do not differ from those of the 1910 Rosebud Act, where Inspector McLaughlin did not negotiate an agreement but reported back the general concurrence of the Indians in the opening.

bill is also clear from the text of the reports, both of which referred to the unopened areas as "the reservations thus diminished" and "the reduced reservation." S. Rep. No. 439 at 4, 5; H.R. Rep. No. 1539 at 3. Thus, the legislation was presented to Congress by the committees with the understanding that it would result in the disestablishment of the areas to be opened, and Congress considered the bill in that context. There is no indication in the limited floor debate that Congress intended any different result from that described in the committee report.[14] It must therefore

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(cont.)
430 U.S. at 610.

14. To the contrary, the debate in the House explicitly confirms that Congress believed that the grant of school lands to the States was made to implement the Enabling Act, just as were the grants in the Rosebud Acts. 42 Cong. Rec. 7005 (1908).

be presumed that the intent to disestablish was carried forward into the Act as passed.

The lack of extensive legislative debate on the 1908 Act is hardly surprising in light of the historical context of the Act. Congress had, in the years immediately preceding the passage of the Cheyenne River Act, passed three similar surplus lands acts with respect to other reservations in South Dakota, and the effect of such statutes must have been well understood.[15] See Act of April 23, 1904, 33 Stat. 254 (Rosebud Reservation); Act of April 21, 1906, 34 Stat. 124 (Lower Brule Reservation); Act of March 2,

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15. In the previous decade, Congress had also provided for the disestablishment of two other reservations in South Dakota by way of statutes ratifying cession agreements. Act of March 3, 1891, 26 Stat. 1035 (Lake Traverse Reservation); Act of August 15, 1894, 28 Stat. 286 (Yankton Reservation). See, e.g., DeCoteau v. District County Court, 420 U.S. 425 (1975) (Lake Traverse); State v. Williamson, 87 S.D. 512, 211 N.W.2d 182 (1973) (Yankton).

1907, 34 Stat. 1230 (Rosebud Reservation). Just as the 1907 and 1910 Rosebud Acts were examined by this Court in the context of the 1904 Rosebud Act, so must the 1908 Cheyenne River Act be viewed in the context of the other statutes opening reservation land in South Dakota.[16] See Rosebud, 430 U.S. at 606 n.30; Dupris, supra 612 F.2d at 326-27 (McMillian, J., dissenting); United States ex rel. Cook v. Parkinson, 525 F.2d at 123.

This Court has emphasized that treaties and statutes involving Indian tribes "cannot be interpreted in isolation but must be read in light of the common notions of the day

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16. The 1906 Lower Brule Act, like the Rosebud Acts already discussed, reduced the size of the affected reservation. Lower Brule Sioux Tribe v. South Dakota, 540 F. Supp. 276, 278 (D.S.D. 1982). Congress also diminished the size of the Pine Ridge Reservation in another similar act in 1910. United States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977).

and the assumptions of those who drafted them." Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978). In this regard it must be remembered that the 1908 Cheyenne River Act and the Rosebud Acts were all enacted during a period when the prevailing federal policy favored the reduction in size of Indian reservations. See, e.g., Montana v. United States, 450 U.S. 544, 559 n.9 (1981); Draper v. United States, 164 U.S. 240, 246 (1896); Hollister v. United States, 145 F. 773, 777 (8th Cir. 1906); [1906] Comm'r Indian Affairs Ann. Rep. 80-81. It is also important to note that at the time the Cheyenne River statute in question was enacted, the extinguishment of Indian title and the alienation of land to non-Indians were commonly understood to terminate the reservation status of the lands involved. See, e.g., Clairmont v. United States, 225 U.S. 551, 558 (1912); Hollister v. United

States, supra at 777-78. In this setting, it is inconceivable that Congress would enact several virtually identical statutes over the same period of time, and under the same circumstances, and intend them to have radically different results. There is nothing in the history of the 1908 Act to suggest that its purpose was any different from that of similar statutes opening other South Dakota Reservations.

C. The Subsequent Treatment of the Opened Area.

The subsequent treatment of the area in question serves only to bolster the conclusion that the 1908 Act had the effect of disestablishment. In 1911, shortly after the area had been opened by presidential proclamation pursuant to the Act, the federal District Court held that the Act had the effect of diminishing the boundaries of the Cheyenne River Reservation by excluding the area opened to settlement, and that the

area was therefore within the jurisdiction of the State. United States v. LaPlant, 200 F. 92 (D.S.D. 1911). The historical record establishes that the State and counties assumed civil and criminal jurisdiction over unallotted lands in the opened area shortly after the opening and continued to exercise jurisdiction without interruption until the Erickson case in 1972. A Juvenile, supra, 453 F. Supp. at 1199. This exercise of jurisdiction was reaffirmed in a series of opinions of the state Supreme Court. See State v. Barnes, 81 S.D. 511, 137 N.W.2d 683 (1965); Lafferty v. State ex rel. Jameson, 80 S.D. 411, 125 N.W. 2d 171 (1963); State v. Sauter, 48 S.D. 409, 205 N.W. 25 (1925).

The historical record also reveals that the officials of the Department of the Interior charged with the administration of the affairs of the Cheyenne River Indians, understood that the opened portion of the

original Cheyenne River Reservation was no longer in reservation status. Dozens of administrative documents, including regulations, reports, decisions, and letters, unambigously refer to the opened area as the "former" reservation or as "ceded" lands, or described the remaining area as the "diminished reservation." See e.g., Letter from Secretary of Interior, S. Rep. No. 819, 60th Cong., 2d Sess. at 2 (1909); Regulations, 47 I.D. 340, 340 (1920); Charlotte Strommer, 48 I.D. 453, 453 (1922); Letter from Acting Secretary of Interior, S. Rep. No. 554, 67th Cong., 2d Sess. at 3, 4 (1922); Letter from Acting Secretary of Interior, S. Rep. No. 1115, 68th Cong., 2d Sess. at 2 (1924); Restoration to Tribal Ownership, 56 I.D. 330, 338 (1938). This understanding is also evident from several Orders of Restoration issued by the Secretary of the Interior under the Indian Reorganization Act

of 1934, 25 U.S.C. §§ 463 and 467. See discussion, ante, at n.4. These orders restored opened but unsold lands to tribal ownership under Section 3 of the Act and declared the lands to be "added to and made a part of the existing Reservation" under Section 7 of the Act, and thus unmistakably reflect the understanding of the Secretary of the Interior that the opened lands were no longer part of the reservation.[17] A Juvenile, supra, 453 F. Supp. at 1194; Stankey v. Waddell, supra, 256 N.W.2d at 127. This consistent, longstanding interpretation of the effect of the 1908 Act by the government agency responsible for the administration of the Act is entitled to great deference. See, e.g., E.P.A. v. National Crushed Stone Assn., 449 U.S. 64, 83 (1980); United States v. National

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17. In addition, both the 1941 and 1952 orders contain references to the "boundaries of the former Cheyenne River Reservation."

Association of Securities Dealers, Inc., 422 U.S. 694, 718-19 (1975); Leary v. United States, 395 U.S. 6, 25 (1969).

Finally, it is apparent that Congress itself understood that it had reduced the size of the Cheyenne River Reservation. In the debate on the 1910 amendment to the 1908 Act, Senator Gamble, the original sponsor of the Act, stated that "[b]y the very act itself ... the lands become a part of the public domain." 45 Cong. Rec. 739 (1910). In subsequent statutes regarding the time allowed to homesteaders for payments for the opened lands, Congress referred to the opened area as "land which was formerly a part of the Cheyenne River Indian Reservation," as the "former" reservation, and as "ceded" lands. Act of April 13, 1912, 37 Stat. 84; Act of March 3, 1925, 43 Stat. 1184; Act of February 14, 1931, 46 Stat. 1107. There are numerous other such

references in congressional reports and debates. See, e.g., S. Rep. No. 1115, 68th Cong., 2d Sess. at 2 (1925); H.R. Rep. No. 694, 67th Cong., 2d Sess. (1922); 48 Cong. Rec. 2335 (1912); S. Rep. No. 819, 60th Cong. 2d Sess. at 1 (1909).

The commonly shared presumption of Congress, the executive branch, and the lower federal courts ought to carry considerable weight in a determination of the effect of the 1908 Act.[18] See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978). That presumption not only serves as evidence of congressional intent but has established perceptions and expectations as to the allocation of jurisdiction over the affected area which should not be overturned

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18. The subsequent history of the area was only briefly touched on in Erickson, at 688, and not at all in Dupris or Bartlett. In none of the cases did the court below acknowledge that it was reversing over sixty years of judicial precedent.

by the strained reading given to the Act by the Court of Appeals. See Rosebud at 604-05.

CONCLUSION

The decision of the court below cannot be reconciled with the decisions of this Court and is in direct opposition to the decisions of the South Dakota Supreme Court. Because of the significance of the case to the governments and inhabitants of the area in question, and the implications which it carries for the disposition of similar cases throughout the nation, the amici counties urge that the petition for certiorari be granted, or, in the alternative, that the decision of the Court of Appeals be vacated in view of this Court's decision in Rosebud.

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No. 82-1253

In the Supreme Court of the United States

OCTOBER TERM, 1982

HERMAN S. SOLEM, WARDEN, AND MARK V. MEIERHENRY, ATTORNEY GENERAL OF SOUTH DAKOTA, PETITIONERS

v.

JOHN BARTLETT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the Act of May 29, 1908 (35 Stat. 460) diminished the Cheyenne River Indian Reservation so that the State of South Dakota (which has not assumed jurisdiction under Pub. L. 280) now enjoys criminal jurisdiction over offenses involving Indians occurring on non-Indian lands within the opened area.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Respondent John Bartlett, an enrolled member of the Cheyenne River Sioux Tribe, pleaded guilty in 1979 in a South Dakota state court to a charge of attempted rape. The crime took place on an alienated parcel of land in Eagle Butte, South Dakota, which lies within the portion of the original Cheyenne River Indian Reservation that was opened to settlement by the Act of May 29, 1908, ch. 218, 35 Stat. 460. Pet. App. A2-A3. After Bartlett's request for post-conviction relief was denied by the South Dakota court in which he had entered his plea (Pet. App. A2, n.1), he filed a petition for a writ of habeas corpus, pursuant to 28

U.S.C. 2254, in the United States District Court for the District of South Dakota. There, he contended that the crime was committed in "Indian country", as defined in 18 U.S.C. (Supp. V) 1151, and that, accordingly, exclusive jurisdiction to prosecute him rested with the Sioux Tribe or the federal government. In opposition, the State of South Dakota contended that the 1908 Act terminated the reservation status of the portion opened to sale to non-Indians and divested the Tribe and the United States of jurisdiction over alienated lands in that area. Pet. App. A2-A3.

2. The district court applied the rulings of the Court of Appeals for the Eighth Circuit in *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (8th Cir. 1973), and *United States* v. *Dupris*, 612 F.2d 319 (8th Cir. 1979), vacated and remanded, 446 U.S. 980 (1980), to the effect that the Cheyenne River Indian Reservation was not disestablished or diminished by the 1908 Act. Therefore, despite contrary decisions by the South Dakota Supreme Court,[1] the district court held that the State was precluded from exercising its criminal jurisdiction over Bartlett since the opened portion remained "Indian country" within the meaning of 18 U.S.C. (Supp. V) 1151. The court granted the writ of habeas corpus, but stayed the effect of its decision pending the outcome of any appeal. Pet. App. A1-A8, A96-A97.

3. The court of appeals, sitting en banc, affirmed (Pet. App. A9-A11), Judges McMillian and Arnold dissenting (Pet. App. A11-A12).[2] The court declined to overrule

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[1] *State* v. *Janis*, 317 N.W.2d 133 (S.D. 1982); *Stankey* v. *Waddell*, 256 N.W.2d 117 (S.D. 1977).

[2] The United States, the Cheyenne River Sioux Tribe, and the Standing Sioux Tribe participated as amici curiae in support of Bartlett. The Counties of Dewey, Corson and Ziebach, South Dakota, and Sioux County, North Dakota, participated as amici curiae in support of the State.

United States v. *Dupris, supra*, and found that *Dupris*, *United States* v. *Long Elk*, 565 F.2d 1032 (8th Cir. 1977), and *United States ex rel. Condon* v. *Erickson, supra*, were consistent with this Court's decisions in *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975), and *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977). Pet. A10-A11.

ARGUMENT

1. The only issue tendered by the petition is the continuing status as "Indian country" of a portion of one Indian Reservation in South Dakota. That question has been squarely decided against the claim of "diminishment" or "disestablishment" in at least three holdings of the Court of Appeals for the Eighth Circuit, *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (1973); *United States* v. *Dupris*, 612 F.2d 319 91979), and the present case. See also, *United States* v. *Fay*, 668 F.2d 375 (1981), affirming in part a criminal conviction under 18 U.S.C. 1153 in respect of offenses committed at Eagle Butte without discussion of the jurisdictional issue. The first of these decisions has been cited and quoted with approval in *Mattz* v. *Arnett*, 412 U.S. 481, 497 n.19, 505 (1973), a precedent since reaffirmed by this Court. See *DeCoteau* v. *District County Court*, 420 U.S. 425, 444, 447-449 (1975); *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 586-587 (1977). What is more, on two occasions, the Eighth Circuit has expressly revisited its seminal *Condon* decision in light of this Court's more recent *DeCoteau* and *Rosebud* rulings and the contrary holdings of the South Dakota Supreme Court and has determined to adhere to its conclusion. *E.g.*, *United States* v. *Long Elk*, 565 F.2d 1032, 1034-1040 & n.10 (1977); *United States* v. *Dupris, supra*, 612 F.2d at 321-323. And, now, after reconsidering the matter en banc, that court has firmly settled the question.

In this situation, there would normally be no occasion for further review. In *Mattz*, *DeCoteau* and *Rosebud*, this

Court announced the governing guidelines. The mere fact that portions of an Indian reservation have been opened for settlement "does not necessarily mean that the opened area has lost its reservation status." *Rosebud, supra*, 430 U.S. at 586-587. Disestablishment will be found only if such an intent is clear on the face of the statute or from surrounding circumstances and legislative history. *Ibid.* Here, we submit, the court of appeals faithfully applied the standards established by this Court and concluded that no diminishment of the Cheyenne River Reservation was intended by Congress—just as it correctly reached the opposite result in *Rosebud*.[3] Such a determination, essentially fact-bound, ordinarily does not warrant review here. See *City of Polson* v. *Salish and Kootenai Tribes*, No. 81-2406 (Nov. 1, 1982), slip op. 1-2 (Rehnquist, J., dissenting from denial of certiorari). See also the orders of this Court denying certiorari cited at Pet. 13.

2. To be sure, a complicating circumstance is presented by the conflicting decisions of the South Dakota Supreme Court. *Stankey* v. *Waddell*, 256 N.W.2d 117 (1977); *State* v. *Janis*, 317 N.W.2d 133 (1982). Thus far, that court has declined to accept the rulings of the federal appellate court

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[3]As the opinion below recited (Pet. App. A11), "*DeCoteau* and *Rosebud* were thoroughly analyzed by [the court of appeals] in *United States* v. *Dupris, supra*, and *United States* v. *Long Elk, supra*." We do not repeat that discussion here. Suffice it to say that the history of the "opening up" of the Cheyenne River Reservation is critically different from the situation in *DeCoteau* and *Rosebud* in at least the following respects: (1) the relevant legislation contains no language of "cession"; (2) there was no prior tribal agreement to cede the relevant area; (3) after opening, the federal government continued to exercise substantial authority over the opened portion of the Reservation; (4) that area has remained primarily Indian in population, embracing the Indian community of Eagle Butte where the Bureau of Indian Affairs Agency for the Tribe and seat of the tribal government are located; and (5) approximately half the land in the opened area is held in trust for the Tribe or its members.

as settling this issue of federal law. But it does not follow that this Court must now intervene to resolve the disagreement.

Significantly, the most recent decision of the South Dakota Supreme Court, in *Janis*, was rendered after this Court vacated, as probably moot, the Eighth Circuit's ruling in *Dupris*. See 446 U.S. 980 (1979).[4] It appears that the State court read this action as removing an otherwise controlling precedent. See 317 N.W.2d at 137-138. That situation is of course altered, now that the federal appellate court, sitting en banc, has again re-affirmed the status of the opened area of the Cheyenne River Reservation. If the present decision stands, it may well be that the South Dakota court will acquiesce in this declaration of federal law. Should the State court persist in its own view, it will be time enough for this Court to consider the matter.

In the meanwhile, there is no urgent impasse. As the Attorney General of South Dakota apparently recognized in the proceedings before the court below, State prosecution of an offense within the scope of Sections 1152 or 1153 of the Federal Criminal Code occurring on the opened area of the Cheyenne River Reservation is effectively barred by the present decision. See Br. in Opp. 6. Presumably, the availability of habeas corpus relief for any person convicted in the state courts will deter any such vain attempt.

Moreover, given only six reported cases in the last decade,[5] it does not appear that the issue of criminal jurisdiction within the contested area presents an acute problem.

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[4]On remand, the case was ultimately mooted by the court of appeals' direction to the district court to grant the government's motion to dismiss the information against Dupris. 664 F.2d 169 (1981).

[5]These are: the previously cited decisions in *Condon*, *Fay*, *Dupris*, and *Janis*, the instant case, and *United States* v. *Mound*, 477 F. Supp. 156 (D.S.D. 1979). The district court decision entitled *United States* v. *Juvenile*, 453 F. Supp. 1171 (D.S.D. 1978), is the same case that the court of appeals reversed *sub nom. United States* v. *Dupris*.

No doubt, this is attributable in part to the sparse population of the region, which is largely Indian. So, also, substantial portions of the area opened up by the 1908 Act were never alienated and were restored to tribal ownership after 1934 (see Br. in Opp. 3; Br. of Dewey Co. *et al.* 5-6 & n.4), and, accordingly, are concededly beyond State criminal jurisdiction. *Ibid.* Of course, Indian allotments within the opened area that remain in trust or restricted status are likewise "Indian country" not subject to State criminal jurisdiction, regardless whether the Reservation boundaries embrace them. 18 U.S.C. (Supp. V) 1151(c). And the same is true of any "dependent Indian community", 18 U.S.C. (Supp. V) 1151(b), a status recognized for one area of Eagle Butte. *United States* v. *Mound, supra.* The upshot is that there is no jurisdictional question, for criminal law purposes at least, as to about the area of the opened portion which today constitutes "Indian country," no matter how the "diminishment" issue is resolved.

There are, in principle, other potential consequences of reservation status, primarily as it affects State authority over Indians on fee lands within the opened area.[6] But no

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[6]Reservation status normally does not affect state taxing or regulatory jurisdiction over non-Indians on alienated lands. See *Utah & N. Ry.* v. *Fisher*, 116 U.S. 28 (1885); *Montana* v. *United States*, 450 U.S. 544 (1981). And the state retains the same criminal jurisdiction of offenses involving only non-Indians whether the situs is inside or outside an Indian Reservation. *United States* v. *McBratney*, 104 U.S. 621 (1882). Nor does the Tribe enjoy jurisdiction over such non-Indians, even within Reservation boundaries, unless they are engaged in commercial dealings with tribal members or their conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana* v. *United States, supra*, 450 U.S. at 565-566. See, also *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978). So far as we are aware, the Cheyenne River Tribe has not sought to exercise any jurisdiction over non-Indians within the opened area, except in respect of sales taxes collected under a cooperative agreement with the State. See note 8, *infra*.

live controversy is presented in these contexts. Compare *DeCoteau* v. *District County Court, supra.* The unique facts of the only reported decision dealing with the diminishment question in a non-criminal setting, *Stankey* v. *Waddell, supra*, suggest no recurring issue of general importance.[7] Any further dispute, should it arise, can be addressed, if need be by this Court. There is no reason to anticipate that eventuality. After all, Public Law 280, as amended in 1968, offers an opportunity for the State and the Tribe amicably to resolve any jurisdictional questions (see 25 U.S.C. 1321(a), 1322(a)), and it is not inconceivable that an agreement, formal or informal, can be reached if and when real problems develop.[8]

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[7]It will presumably be a rare case, indeed, in which a member of another related Tribe, the widow of a non-Indian, residing on an alienated parcel, seeks exemption from personal property taxes previously assessed against her late husband. See 256 N.W.2d at 118 & n.1. It is not altogether clear that Mrs. Stankey was entitled to immunity from State taxation even if the non-Indian parcel on which her property was located were deemed part of the Reservation. But, at all events, it is unusual in the case of the Cheyenne River Reservation to find an Indian living on alienated land.

[8]For instance, we are advised that, since 1976, the State and the Tribe have operated under an agreement in respect of sale taxes, which are collected by the State on all sales throughout the original area of the Reservation, regardless of land status and the race of buyer and seller, and then remitted in part to the Tribe according to an agreed formula. That practical accommodation effectively moots, for this purpose, otherwise complex jurisdictional issues.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SOUTH DAKOTA STATE PENITENTIARY; and
MARK V. MEIERHENRY, ATTORNEY GENERAL,
STATE OF SOUTH DAKOTA,

Petitioners,

v.

JOHN BARTLETT,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF PETITIONERS

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QUESTION PRESENTED

Whether the opening of land within the original Cheyenne River Reservation to settlement by non-Indians through the Act of May 29, 1908, 35 Stat. 460, diminished the original reservation so as to confer criminal jurisdiction within the opened area upon the State of South Dakota?

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The decision of the United States District Court for the District of South Dakota is unreported. That decision, dated April 19, 1982, appears in the Appendix to Petition for Certiorari [hereinafter "AP"] at pp. A1-A8. The opinion of the United States Court of Appeals for the Eighth Circuit is reported at the following citation: Bartlett v. Solem, 691 F.2d 420 (8th Cir. 1982) (en banc).

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JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on

October 27, 1982. The Petition for Writ of Certiorari was filed on January 25, 1983. The Petition for Writ of Certiorari was granted on May 31, 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The term "Indian Country" is defined in 18 U.S.C. § 1151. That section provides as follows:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

The western portion of the original Cheyenne River Reservation was opened to settlement by non-Indians by the Act of May 29, 1908, 35 Stat.

460. The 1908 Surplus Lands Act was amended by the Act of February 17, 1910, 36 Stat. 196.[1]

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

On April 24, 1979, Bartlett pleaded guilty to attempted rape in a South Dakota state court in Dewey County, South Dakota. Bartlett is an enrolled member of the Cheyenne River Sioux Tribe. The crime took place in Eagle Butte, Dewey County, South Dakota. The exact location of the crime is as follows: Lot 12, Block 16 of the Milwaukee Land Company's First Addition to the town now City of Eagle Butte, South Dakota, located in the NW 1/4, SW 1/4 of Section 17, Township 12 North, Range 24 East of the Black

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[1] Hereinafter the Act of May 29, 1908, will be referred to as either "1908 Surplus Lands Act," "1908 Act" or "Act." The 1908 Act is set forth in the Appendix (Appendix A, pp. A1-A16). The Act of February 17, 1910, is also set forth in the Appendix (Appendix B, A17-A20).

Hills Meridian, Dewey County, South Dakota. This land was patented to T.C. Sherman on November 17, 1910, by the United States government and now is non-trust property owned by Vernon Anderson, a non-Indian. This land is within the confines of the original Cheyenne River Reservation created by the Act of March 2, 1889, 25 Stat. 888; however, the land now lies outside the original Cheyenne River Reservation because that area was opened to settlement by the 1908 Surplus Lands Act.

B. PROCEDURAL HISTORY

On February 9, 1982, Bartlett filed a petition for a Writ of Habeas Corpus in United States District Court for the District of South Dakota. AP, A32-A42.

In his petition, Bartlett claimed that his plea of guilty in state court to an attempted rape charge was invalid because he committed the crime in "Indian Country," as that term is defined in 18 U.S.C. § 1151. According to Bartlett, because

the crime was committed in Indian Country, the state court system had no jurisdiction over him or the crime he committed. The United States District Court for the District of South Dakota considered the matter on the written record. The District Court's Memorandum Opinion, dated April 19, 1982, granted Bartlett's Petition. AP, A1-A8. The Court concluded that the 1908 Surplus Lands Act did not diminish the boundaries of the original Cheyenne River Reservation and that the state lacked criminal jurisdiction over the location of the crime committed by Bartlett.[2]

Bartlett's original action in the United States District Court for the District of South Dakota was brought under the provisions of 28 U.S.C. §

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[2] The process of redrawing the boundaries of an Indian reservation which has been opened to settlement has been described as "termination," "diminishment," and "disestablishment." These terms are interchangeable. See, United States v. Dupris, 612 F.2d 319, 320 n. 3 (8th Cir. 1979); State v. Janis, 317 N.W.2d 133, 134 n. 1 (S.D. 1982). Throughout this Petition, the process will be referred to as "diminishment."

2254. The District Court had jurisdiction under the provisions of 28 U.S.C. § 2254. Notice of Appeal to the United States Court of Appeals for the Eighth Circuit was filed on May 11, 1982. The Notice of Appeal was filed within the thirty (30) days allowed by Rule 4(a)(1) of the Federal Rules of Appellate Procedure.

On June 30, 1982, the State filed a Petition Suggesting Hearing En Banc before the Court of Appeals. On July 30, 1982, the petition was granted. An en banc argument before the Court of Appeals was held on September 15, 1982, in St. Paul, Minnesota. The decision by the Court of Appeals, dated October 27, 1982, affirmed the decision of the District Court.[3] AP, A9-A12.

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[3] Also raised as an issue in the Court of Appeals was whether the crime committed by Bartlett occurred within a "dependent Indian community," as that term is used in 18 U.S.C. § 1151. Because the lower courts have determined that the boundaries of the original reservation have not been diminished, the merits of this issue have not been developed or discussed in the courts below. See, United States v. Dupris, 612 F.2d 319, 341 (8th Cir. 1979) (McMillian J., dissenting).

The Court of Appeals had jurisdiction of the appeal under the provisions of 28 U.S.C. § 1291.

Petitioners Solem and Meierhenry filed a Petition for Writ of Certiorari on January 25, 1983.[4] This Petition sought review of the decision by the Eighth Circuit Court of Appeals. The Petition for Writ of Certiorari was granted on May 31, 1983.

SUMMARY OF ARGUMENT

The question presented in this appeal can be answered through the proper application of the guidelines set by this Court in DeCoteau v. District County Court, 420 U.S. 425 (1974) and Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977). Foremost among these guidelines are: (1) that the Court must first look to the face of the Act in question to determine whether the language indicates a congressional intent to diminish; and

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[4] Petitioners Solem and Meierhenry represent the State of South Dakota and will hereinafter be referred to by the term "State."

(2) that in order to ascertain congressional intent, the Court can look beyond the face of the Act to the circumstances surrounding the passage of the Act and the legislative history of the Act for evidence of an intent to diminish.

The intent of Congress is clear upon the application of these simple principles to the 1908 Surplus Lands Act, which opened the original Cheyenne River Reservation to settlement: the boundaries of the original reservation were to be redrawn following the passage of the Act, with the result being a compact, yet diminished, reservation.

The Act itself includes several specific examples of an intent to diminish. In section 2, the description of the land not opened to settlement as the "reservation thus diminished," is a clear indication of such intent. The granting of certain sections of land for school use, pursuant to the Enabling Act, which is found in section 7, can only mean that the 1908 Act was intended to

diminish the original reservation boundaries. The return of land, pursuant to section 9, to the "public domain," further evidences an intent to diminish. Finally, the subsequent amendment of section 8 to prohibit intoxicants in the opened area also clearly evidences an intent to diminish.

Review of the other facts, such as the historical context of the enactment of the Act, the legislative history of the Act, and the subsequent jurisdictional treatment of the area in question, all support the intent to diminish found on the face of the Act itself. Especially useful in this review are the notes and report of Inspector James McLaughlin, the Indian agent who discussed the opening of the original reservation with both the Standing Rock and Cheyenne River Sioux Tribes prior to the enactment of the 1908 Surplus Lands Act.

All of these pieces of evidence point unequivocally to an intent by Congress to diminish the original Cheyenne River Reservation with the

passage of the 1908 Act. This conclusion is reached following an analysis consistent with this Court's pronouncements in the diminishment area. Throughout its analysis of this question, however, the United States Court of Appeals for the Eighth Circuit has either overlooked or ignored these clear declarations of an intent to diminish. United States ex rel Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973); United States v. Dupris, 612 F.2d 319 (8th Cir. 1979); Bartlett v. Solem, 691 F.2d 420 (8th Cir. 1982) (en banc).

This appeal presents the Court with an opportunity to correct the Court of Appeals' misapplication of diminishment principles that have been clearly enunciated by this Court. An analysis of the 1908 Surplus Lands Act which is consistent with this Court's decisions in Rosebud Sioux Tribe, supra and DeCoteau, supra, supports the State's contention that the Act diminished the boundaries of the original Cheyenne River Reservation, and that the State

has jurisdiction over the crime committed by Bartlett within the area so diminished.[5]

ARGUMENTS AND AUTHORITIES

THE STATE OF SOUTH DAKOTA HAS JURISDICTION OVER CRIMES COMMITTED ON UNALLOTTED LAND OWNED BY NON-INDIANS IN THE AREA OF THE ORIGINAL CHEYENNE RIVER RESERVATION OPENED BY THE 1908 SURPLUS LANDS ACT.

The United States Court of Appeals for the Eighth Circuit, with Theodore McMillian and Richard S. Arnold, Circuit Judges, dissenting, concluded that Congress did not intend to diminish the original Cheyenne River Reservation when it enacted the 1908 Surplus Lands Act. Bartlett

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[5] The State acknowledges that the federal government and the tribes have exclusive jurisdiction over Indian activities on those portions of the original reservation which were restored to reservation status pursuant to 25 U.S.C. § 467, and on Indian allotments presently held in trust. 18 U.S.C. § 1151. Further, the State does not question the continued extension of federal services to tribal members residing within the area in question. see, Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 615-616 n. 48 (1977).

v. Solem, 691 F.2d 420, 421 (8th Cir. 1982) (en banc). In reaching this conclusion, the court stated:

> DeCoteau and Rosebud were thoroughly analyzed by this Court in United States v. Dupris and United States v. Long Elk. We conclude that the views expressed by this Court in Erickson, Long Elk and Dupris are consistent with the opinions of the Supreme Court in DeCoteau and Rosebud.[6]

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[6] The decisions cited by the Court of Appeals within this quotation are as follows:

(1) DeCoteau v. District County Court, 420 U.S. 425 (1974);

(2) Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977);

(3) United States v. Dupris, 453 F.Supp. 1171 (D.S.D. 1978), rev'd, 612 F.2d 319 (8th Cir. 1979), vacated and remanded, 446 U.S. 980 (1980), prosecution dismissed, 664 F.2d 169 (8th Cir. 1981);

(4) United States v. Long Elk, 565 F.2d 1043 (8th Cir. 1977); and

(5) United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973) [hereinafter "Erickson"].

Bartlett, supra at 421 (footnote added.)

The following argument by the State clearly illustrates the clear error in the Court of Appeals' analysis with respect to the interpretation of the 1908 Surplus Lands Act. The argument also highlights the fact that the Court of Appeals totally ignored the dictates of this Court, as set forth in DeCoteau and Rosebud Sioux Tribe.

THE DIMINISHMENT ANALYSIS

This Court has, on many occasions, had an opportunity to determine whether an Act of Congress was intended to diminish the original boundaries of an Indian reservation. The analysis in such questions was originally set forth by this Court in Seymour v. Superintendent, 368 U.S. 351 (1962). This analysis has been expanded and refined in subsequent decisions of the Court. Mattz v. Arnett, 412 U.S. 481 (1973); Decoteau, supra; and Rosebud Sioux Tribe, supra. see, Puyallup Tribe v. Department of

Game of State of Washington, 433 U.S. 165, 174 n. 11 (1977); State v. Janis, 317 N.W.2d 133, 135-137 (S.D. 1982).

In Rosebud Sioux Tribe, the most recent diminishment decision, this Court set forth the following guidelines for analysis and canons of construction:

> (1) Congressional intent is controlling;
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> (2) Doubtful or ambiguous expressions are to be resolved in favor of the Indians;
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> (3) Opening a reservation for settlement does not necessarily mean that the opened area loses its reservation status;
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> (4) The canon of construction requiring that doubtful expressions are to be construed in favor of the Indians does not require a determination that reservation status survives congressionally manifested intent to the contrary; and
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> (5) In order to ascertain congressional intent, a court is obliged to look at the Act in question, the surrounding circumstances and the legislative history.

Rosebud Sioux Tribe, 430 U.S. at 586-587. see also, Rosebud Sioux Tribe v. Kneip, 521 F.2d 87,

91 (8th Cir. 1975) (inquiry into the diminishment issue "may encompass all materials reasonably pertinent to the legislation"); DeCoteau, 420 U.S. at 447 ("A canon of construction is not a license to disregard clear expressions of tribal and congressional intent.")

The following argument will analyze the 1908 Surplus Lands Act, which opened the original Cheyenne River Reservation to settlement by non-Indians, using the standards set forth in the Rosebud Sioux Tribe decision. Such analysis leaves no doubt that the 1908 Surplus Lands Act was intended to diminish the original Cheyenne River Reservation. The first step in this analysis is a review of the language in the Act itself.

A. The 1908 Surplus Lands Act.

The original Cheyenne River Reservation was established by the Act of March 2, 1889, 25 Stat. 888. In 1908, following discussions between the federal government, through experienced Indian

Agent James McLaughlin and the members of the Cheyenne River and Standing Rock Sioux Tribes, Congress enacted the 1908 Surplus Lands Act. This statute directed the Secretary of Interior to "sell and dispose of" the unallotted lands in both the Cheyenne River and Standing Rock Reservations.[7] In 1910, pursuant to the provisions of

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[7] The Standing Rock Reservation is located within Corson County, South Dakota and Sioux County, North Dakota. Because of the location of the offense committed by Bartlett, the jurisdictional status of the Standing Rock Reservation is not directly at question in this action.

The United States Court of Appeals for the Eighth Circuit has decided that Congress did not intend to diminish the eastern portion of the Standing Rock Reservation, which was opened to settlement by the Act of February 14, 1913, 37 Stat. 675. United States v. Long Elk, 565 F.2d 1032 (8th Cir. 1977). The jurisdictional status of the eastern portion of Standing Rock Reservation is also not at question in this action.

The jurisdictional status of the portion of the Standing Rock Reservation opened by the 1908 Surplus Lands Act will no doubt be directly affected by the decision in this case. The decision in this appeal will also have a significant impact upon the previous determinations made by

the Act, the western portion of both reservations and a strip along both sides of the east-west boundary between the reservations were opened to settlement by non-Indians. Act of May 29, 1908, 35 Stat. 460; Presidential Proclamation of August 19, 1909, 36 Stat. 2500.

The following map illustrates the portions of Corson, Dewey and Ziebach counties, South

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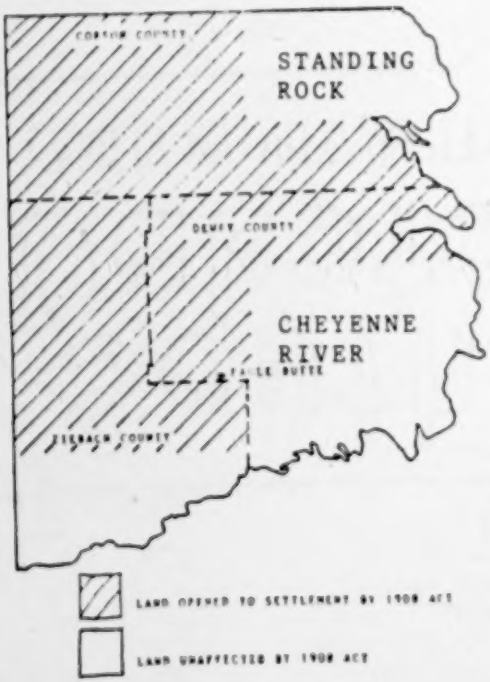
the Court of Appeals in Long Elk, supra, and in Lower Brule Sioux Tribe v. South Dakota, 540 F.Supp. 276 (D.S.D. 1982), aff'd in part and rev'd and remanded in part, ___ F.2d ___ (8th Cir. June 27, 1983). In both of these cases, one involving the eastern portion of the Standing Rock Reservation and the other dealing with lands within the original Lower Brule Reservation taken pursuant to the Flood Control Act of 1944, 16 U.S.C. § 460d, the Court of Appeals decided diminishment issues, relying upon the erroneous analysis of such questions embodied in its decision in United States v. Dupris, supra, and United States ex rel. Condon v. Erickson, supra. This faulty diminishment analysis was affirmed by the Court of Appeals in the decision below. Bartlett, supra at 421.

Dakota, which were opened to settlement by the 1908 Surplus Lands Act.[8]



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[8] Some of the area opened to settlement by the 1908 Act is trust land owned by Indians, and is therefore subject to tribal and/or federal jurisdiction. see, note 5, supra. While a finding of diminishment will necessarily create "checkerboard jurisdiction," that fact is neither dispostive nor controlling on whether Congress intended to diminish the original reservation. see, DeCoteau, supra; Rosebud Sioux Tribe, supra; Washington v. Yakima Indian Nation, 439 U.S. 463, 499-502 (1979).

Four separate sections of the 1908 Surplus Lands Act itself specifically and unequivocally illustrate the intent of Congress to diminish the original Cheyenne River Reservation when it enacted the 1908 Surplus Lands Act.

1. Section 2: Reservation thus diminished.

Language in section 2 of the 1908 Surplus Lands Act specifically describes the land not opened to settlement as the "reservation thus diminished." Appendix A; p. A5. Compare, AP, p. A65 (language in the 1910 Rosebud Act describing the land not opened to non-Indian settlement as "the diminished reservation"); and AP, p. A79 (language in the 1910 Pine Ridge Act describing the land not opened to non-Indian settlement as "the diminished reservation.")

This language is explicit evidence of an intent to diminish the original boundaries of the Cheyenne River Reservation. See, DeCoteau, 420 U.S. at 446-447; Rosebud Sioux Tribe v. Kneip,

521 F.2d 87, 99 (8th Cir. 1975); United States ex rel. Cook v. Parkinson, 525 F.2d 120, 123 (8th Cir. 1975), cert. denied, 439 U.S. 982 (1977). See also, Rosebud Sioux Tribe, 430 U.S. at 613-614 (a similar provision in the 1910 Rosebud Act is highly persuasive evidence of diminishment).

2. Section 7: School lands.

Section 7 of the 1908 Surplus Lands Act reserves sections 16 and 36 of each township in the opened area and grants them to the states in which they are located "for the use of common schools." Appendix A, pp. A12-A13. These are the same numbered sections that were historically reserved for and granted to the states for school purposes. see, Act of February 22, 1889, 25 Stat. 676 (South Dakota Enabling Act).

This Court reviewed similar language in the acts which opened the Rosebud Reservation in Rosebud Sioux Tribe, supra. AP, pp. A74-A75. After such review, this Court concluded that this

language is strong evidence of diminishment. Rosebud Sioux Tribe, 430 U.S. at 599-601. As in the 1904 Rosebud Act, Congress included section 7 of the Act in question in order to implement a grant to the State of South Dakota which was made under the Enabling Act, but which was deferred until the reservation was extinguished and the land was restored to the public domain. see, AP, pp. A51-A52 (similar school lands section in 1904 Rosebud Act).

In part, section 10 of the Enabling Act, Act of February 22, 1889, 25 Stat. 676, states (emphasis added):

> [N]or shall any lands embraced in Indian, military or other reservations of any character, be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to and become a part of, the public domain.

The 1908 Surplus Lands Act, therefore, provided payment for sections which had been granted to

the State of South Dakota pursuant to the Enabling Act. Because the school land dealt with in section 7 of the Act was part of an Indian reservation at the time South Dakota became a state, under the explicit terms of the Enabling Act, the reservation status of the land must have been extinguished and the land restored to the public domain before the grant of school land found in section 7 could have taken place. In short, the grant of school lands found in section 7 is necessary only if the reservation status of the lands so granted was extinguished.

3. 1910 Amendment: Prohibition of intoxicants.

The Act of February 17, 1910, 36 Stat. 196, amended section 8 of the 1908 Surplus Lands Act. By these amendments, the introduction of intoxicating beverages into the area opened by the 1908 Surplus Lands Act was prohibited. Appendix B, pp. A18-A19. If the area of the original reservation opened by the 1908 Act was still part of the

original reservation, this 1910 legislation was unnecessary. The area would have still been "Indian country," and selling intoxicants in "Indian country" was already prohibited. see, Act of July 23, 1892, 27 Stat. 260.

An identical prohibition provision is found in the 1910 Rosebud Act, which opened the Rosebud Reservation to settlement. AP, p. A76. This Court found this provision to be an expression of a congressional intent to diminish the boundaries of the original Rosebud Reservation. As the Court stated:

> [T]he most reasonable inference from the inclusion of this provision [concerning prohibition of intoxicants on surplus lands] is that Congress was aware that the opened, unallotted areas would henceforth not be "Indian country," because not in the reservation.

Rosebud Sioux Tribe, 430 U.S. at 613. The same considerations which led this Court to reach this conclusion in regard to the 1910 Rosebud Act are present in regard to an identical provision in the 1908 Surplus Lands Act.

4. Section 9: Public Domain.

Language in section 9 of the 1908 Surplus Lands Act explicitly returns the opened lands in the original Cheyenne River Reservation to the public domain. Appendix A, p. A16. Restoration of land to the public domain has been recognized by this Court as being synonymous with diminishment. Rosebud Sioux Tribe, 430 U.S. at 589 n. 5; DeCoteau, 420 U.S. at 426-427, 446, 448-449; Seymour v. Superintendent, 368 U.S. at 358.

5. Summary: A clear intent to diminish.

The foregoing arguments set forth the explicit language of the 1908 Surplus Lands Act which evidences a clear congressional intent to diminish the portions of the original Cheyenne River Reservation opened to settlement by the 1908 Act. The Court of Appeals, however, in reviewing the issue presented in this appeal, has either disregarded, downplayed, or ignored this explicit statutory language. United States ex rel Condon

v. Erickson, 478 F.2d 684 (8th Cir. 1973); United States v. Dupris, 612 F.2d 319 (8th Cir. 1979); Bartlett v. Solem, 691 F.2d 421 (8th Cir. 1982).

On the other hand, the courts which have concluded that the 1908 Act diminished the boundaries of the original reservation, have found the statutory language in the 1908 Surplus Lands Act to be strong evidence of an intent to diminish. Stankey v. Waddell, 256 N.W.2d 117, 120-122 (S.D. 1977); United States v. Juvenile, 453 F.Supp. 1171, 1188-1195 (D.S.D. 1979). see also, United States v. Dupris, 612 F.2d 319, 328-335 (McMillian, J., dissenting). see generally, State v. Janis, 317 N.W.2d 133 (S.D. 1982).

The 1908 Surplus Lands Act, on its face evidences a clear congressional intent to diminish the original Cheyenne River Reservation. A review of the other factors set forth in Rosebud Sioux Tribe, DeCoteau, and Seymour--the legislative history of the Act, the historical and

surrounding circumstances of the promulgation of the Act, and the subsequent jurisdictional treatment of the geographical area in question-- would therefore be unnecessary. However, when these factors are also reviewed, the intent of the language found in the 1908 Surplus Lands Act supports no other intent save diminishment. The language of the Act reflects the unambiguous intent to diminish the original Cheyenne River Reservation, and is supported by a review of these other factors.

B. The Historical Setting.

The 1908 Surplus Lands Act is one of a series of Acts of Congress which opened Indian reservation land to settlement by non-Indians. The Acts within this series are often referred to as Surplus Lands Acts. In addition to the Act in question, several other Acts opened the other Sioux Indian Reservations in South Dakota to settlement by non-Indians. These Surplus Lands

Acts are specific acts which effectuated the general policy guidelines set forth in the General Allotment Act of 1887, 24 Stat. 388, commonly referred to as the Dawes Act. Portions of both the original Rosebud and original Pine Ridge Reservations in South Dakota were opened to settlement by specific Surplus Lands Acts. The Rosebud Reservation was opened by the following series of acts: Act of April 23, 1904, 33 Stat. 254; Act of March 2, 1907, 34 Stat. 1230; and Act of May 30, 1910, 36 Stat. 448. The Pine Ridge Reservation was opened by the Act of May 27, 1910, 36 Stat. 440. Earlier, the Lake Traverse Reservation was opened by the Act of March 3, 1891, 26 Stat. 989. To fully understand the historical context in which the 1908 Surplus Lands Act was enacted, a short review of the changing Indian policy of that time is necessary.

1. Familiar forces.

The Act of April 29, 1868, 15 Stat. 635, created the Great Sioux Reservation in what is

now western South Dakota. Soon thereafter, "familiar forces" began to exert pressures on the land and on the policymakers, making the continued vitality of large reservations questionable. DeCoteau, 420 U.S. at 431-435. The last part of the nineteenth century saw these "forces" exerting ever-increasing pressure. This time period saw rapid settlement and development in the West. This growth led to a need for federal legislation providing for the acquisition of Indian land and resources. F. Cohen, Handbook of Federal Indian Law at 128 (1982 ed.) [hereinafter referred to as Cohen]. One response to these pressures was the passage of the Dawes Act.

The pressure of these "familiar forces" was great:

> Eastern philanthropists wanted to civilize the Indian; western settlers wanted Indian land. The expanding white civilization continued to break down the reservations, and the federal government could not or would not prevent it. The pressure for Indian land was a powerful motivating force for the allotment policy. Private land speculators,

> timber interests, and railroads took part in its development. It was hoped that an added benefit of allotment would be relief from the expensive burden of Indian appropriations.

Cohen, supra at 132 (footnote omitted). In describing the Allotment Period of American Indian history, one commentator has distinguished the Dawes Act as the major feature of that period. The description of the period continues with the following conclusion:

> Congress contemplated forcing the Indians to accept its allotment policy with provisions that contemplated the ultimate dissolution of the Indian tribe and its reservation.

Price and Clinton, Readings, Notes and Cases: Law and the American Indian at 78 (Michie Company, 2d Ed. 1981). The wisdom of this policy is not at issue in this appeal. As Justice Rehnquist noted: "Some might wish [Congress and the tribe] had spoken differently, but we cannot remake history" DeCoteau, 420 U.S. at 449.

A result of the clear shift by the federal government to individual allotments was the creation of smaller reservations and the opening of large areas of former reservation land to settlement by non-Indians. The Cheyenne River Reservation was established by the Act of March 2, 1889, 25 Stat. 888. That reservation encompassed the entire area of what is now Ziebach and Dewey Counties in South Dakota.

Even the creation of smaller reservations did not satisfy the forces exerting pressure for the opening of unused reservation land to settlement. These ever-stronger forces militated against large, unwieldy Indian reservations set on land being coveted by non-Indian settlers seeking an opportunity along the vanishing frontier. Surplus Lands Acts became commonplace during this time. Land not needed to provide allotments for tribal members was considered "surplus" by the non-Indian settlers. The Surplus Lands Acts

that became law during the period from 1885 through 1915 were a further response to settlement pressures of the time.

2. Inspector McLaughlin and the Sioux Indians of South Dakota.

The original Cheyenne River Reservation created by the Act of March 2, 1889, which created the western South Dakota reservations, included nearly 2.9 million acres. Even as these lands were set aside for the Cheyenne River Sioux Tribe, the forces aimed at opening up the large tracts of unsettled and unallotted reservation lands were already in motion. Section 5 of the Dawes Act and Section 12 of the 1889 Act included nearly identical provisions allowing for the negotiation between the tribes and the federal government for the sale of unallotted tribal lands. Pursuant to these provisions, the negotiations process with the Cheyenne River Sioux Tribe, which led to the passage of the 1908 Surplus Lands Act in question in this appeal, was begun.

On December 9, 1907, Senator Gamble of South Dakota, the primary sponsor of the federal legislation which led to the diminishment of portions of the Rosebud and Pine Ridge Reservations, introduced S. 1385. This bill authorized "the sale and disposition of a portion of the surplus unallotted lands of the Cheyenne River and Standing Rock Reservations." 42 Cong. Rec. 207 (1907).

The actual duty of negotiating the "sale and disposition" of the Indian lands was conferred upon Inspector James McLaughlin. Inspector McLaughlin had also negotiated the sale of reservation land on the Rosebud and Pine Ridge Reservations. McLaughlin met with members of the Standing Rock Sioux Tribe in Fort Yates, North Dakota, early in 1908. He then travelled to the Cheyenne River Agency in South Dakota for discussions with members of the Cheyenne River Sioux Tribe in regard to Senator Gamble's proposed legislation to open the reservation to

non-Indian settlement. These discussions began on March 16, 1908. The detailed minutes of these meetings are found in both the Senate and House Reports that accompany S. 1385. S. Rep. No. 439, 60th Cong., 1st Sess. (1908); H.R. Rep. No. 1539, 60th Cong., 1st Sess. (1908).[9] see, Appendix C, pp. A51-A123 [Standing Rock minutes], A123-A162 [Cheyenne River minutes]. A detailed study of the contents of these minutes is set out in the next section.

It is significant to note that the Court of Appeals ignored the historical context surrounding the passage of the 1908 Surplus Lands Act. Erickson, supra at 688. A comparison of the language and legislative history of the 1908 Act

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[9] These reports are essentially identical. For convenience, House Report No. 1539 is set out in the Appendix (Appendix C, pp. A21-A162). References to this Report will be made by using the phrase "House Report," followed by the appropriate page number from the Report, and, in parenthesis, the appropriate page number from the Appendix.

with that of the acts which opened both the Rosebud and Pine Ridge Reservations reveals that there are no significant differences in the statutes. However, as important as the similarities in the language contained within these acts are to the State's argument, the other historical similarities are also significant. The sponsors of the acts in Congress were the same. see, Dupris, supra at 326 n. 4 (McMillian, J., dissenting). Moreover, Inspector McLaughlin dealt with not only the Cheyenne River and Standing Rock Sioux Tribes, but also with the Indians on both the Rosebud Reservation and the Pine Ridge Reservation prior to the opening of those reservations to settlement by non-Indians. see, Dupris, supra at 326 n. 5 (McMillian, J., dissenting).

These similarities are a strong indication of the identity of purpose among the Acts. The decisions of this Court note the similarities

between the Acts opening reservations to settlement, and recognize these similarities as highly persuasive evidence of diminishment. see, Rosebud Sioux Tribe, 430 U.S. at 608-609, 612-613; DeCoteau, 420 U.S. at 446; United States ex rel. Cook v. Parkinson, supra at 123. see also, AP, p. A31, which is a map of the State of South Dakota illustrating the status of the reservations in the State opened to non-Indian settlement in the late 1800's and early 1900's, including those reservations in western South Dakota where Inspector McLaughlin was involved in discussion with the respective tribes.

The opening of the western South Dakota Indian reservations involved two primary actors. Senator Gamble introduced the legislation in Congress which actually led to the opening of the Rosebud, Pine Ridge, Standing Rock and Cheyenne River Reservations. This legislation was enacted in 1904, 1907, 1908 and 1910. Prior

to the enactment of each of these pieces of legislation, Inspector McLaughlin held discussions with the respective tribes. The courts have held that the boundaries of the Rosebud and Pine Ridge reservations were diminished by this congressional action. Rosebud Sioux Tribe, supra; United States ex rel. Cook v. Parkinson, supra. The Court of Appeals, however, has chosen to ignore the strong historical evidence of an intent to diminish that is contained within the passage of the other Acts of Congress which opened other Sioux Indian Reservations in South Dakota to settlement by non-Indians. The inferences gained by a review of the historical setting in which the 1908 Surplus Lands Act was enacted clearly supports the intent to diminish found on the face of the Act itself. Any other result would create an unintended and unexplainable anomaly in the historical setting surrounding the opening of the Indian reservations in western South Dakota.

C. Legislative History.

The reports of Inspector James McLaughlin, including the minutes of his discussions with the Standing Rock and Cheyenne River Sioux Tribes in regard to the opening of the lands by the 1908 Surplus Lands Act, illustrate the contemporaneous interpretation of the words of the Act as those words were understood by the parties to the discussions. These notes and reports became an integral part of the legislative history through their inclusion in the House and Senate Reports which accompanied the 1908 Surplus Lands Act out of committee. The Court of Appeals used this material sparingly in Erickson, Dupris and Bartlett. However, because of the guidelines set by Rosebud Sioux Tribe and DeCoteau, these notes and reports must be carefully scrutinized in order to discern possible evidence of an intent to diminish. The various courts which have found,

subsequent to the decision in Rosebud Sioux Tribe, that the original reservation was diminished by the 1908 Surplus Lands Act, have made such studies, and have relied upon the evidence of an intent to diminish which is found in these notes and reports. Stankey v. Waddell, supra at 122-126; State v. Janis, supra at 137; United States v. Juvenile, supra at 1176-1188; United States v. Dupris, supra at 329-331 (McMillian, J., dissenting).

1. Inspector McLaughlin at the Cheyenne River Agency: The Minutes.

On March 16, 1908, Inspector McLaughlin made a presentation at the Cheyenne River Agency.[10] This presentation began with a description of the proposed legislation involving surplus land on the reservation:

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[10] On March 9, 1908, McLaughlin held a meeting in Fort Yates, North Dakota, with the members of the Standing Rock Sioux Tribe concerning the 1908 Surplus Lands Act. The method and substance of the discussions of Inspector McLaughlin

> There was a bill introduced in the U.S. Senate by Senator Gamble, of South Dakota, on December 9 last, a little over three months ago, which provides for the opening of that portion of your reservation embraced in Schnasse County, and another bill was introduced in the House of Representatives by Congressman Hall, of South Dakota, on the 24th of last month, three weeks ago today, which latter bill provides for the opening of all the surplus lands of the Cheyenne River Reservation. . . .

House Report at 21 (A127). McLaughlin then counseled careful consideration of the matter by the Tribe:

> Agree among yourselves upon some compromise measure between the two bills which may receive the approval of the Department and be acceptable to Congress.
>
> Determine upon how much, and what portion, of your reservation you are willing to relinquish;

---

with the members of the Standing Rock Sioux Tribe immediately prior to his discussions with the Cheyenne River Sioux Tribe, and the evidence of diminishment shown by these discussions are clearly within this Court's scope of review in this matter. see, Rosebud Sioux Tribe v. Kneip, 521 F.2d 87, 91 (8th Cir. 1975). The Standing Rock minutes are set forth in the Appendix. Appendix C, pp. A51-A123.

House Report at 22 (A131) (emphasis added).

The council adjourned, and when it reconvened, Inspector McLaughlin again discussed the bills introduced in Congress concerning the Standing Rock and Cheyenne River Reservations. This discussion demonstrates McLaughlin's belief that the negotiations with the tribes would lead to a compact reservation with redrawn boundaries:

> The bills introduced for Standing Rock and Cheyenne River reservations by Congressmen from the respective States in which the lands are situated, providing for opening all surplus land of the reservations, will doubtless become a law in a modified form. After I explained the matter to the Standing Rock people very fully they saw the wisdom of meeting the wishes of Congress in a very reasonable manner, by which I am quite confident that they will have a diminished reservation created, which will remain so for many years, and it will enable them to have allotments for the children born to them for many years to come. It is my desire that you meet the question in the same manner as Standing Rock. You are one people; you are of the same blood; you live under the same treaty, and I hope you will meet the matter similarly. I am quite confident that when I submit my Standing Rock council minutes to the Secretary of the Interior

> that he and the Commissioner will be very much pleased, and submit it to Congress with recommendation that it be accepted, which would leave the Indians a permanent diminished reservation. As many of the Standing Rock Indians have taken allotments in the portion that will be opened it will leave them about 500,000 acres of surplus land on the diminished reservation; and on this reservation, juding from what I have heard the Indians saying to the alloting agent to-day, in desiring lands in the parts proposed to be opened, that you will have fully a million acres of vacant lands within the lines I have suggested.
>
> My friends, you will be perfectly safe in allowing the Secretary of Interior and the Commissioner of Indian Affairs to determine the lines for you.

House Report at 24-25 (A142-A144) (emphasis added).

Further excerpts from the transcripts of Inspector McLaughlin's discussions with the Cheyenne River counsel are significant in determining the intent of Congress when it enacted the 1908 Surplus Lands Act. One of these excerpts deals with Inspector McLaughlin's discussion of

the "familiar forces" pressing on the surplus reservation land:

> I know the sentiment of the Indians regarding their reservations and of the desire to hold them intact, which is only natural, but for the Indians to hold large tracts of unused land is now impossible, my friends, and you must bring yourselves to accept the inevitable, and rely upon the Department to obtain for you reasonable compensation for the lands you do not need.
>
> Large reservations were possible in the past, but there was then what was known as frontier.
>
> That was when the principal portion of the population of this country lived east of the Mississippi River, but the tide of emigration from European countries to the United States forced home seekers constantly westward from the east and later on eastward from the west until the two waves met and obliterated the so-called frontier.
>
> There is no more frontier where settlers may find homes readily, and the steadily increasing population of the country demands all available land possible for the incoming settlers. The demand for land for home seekers is now so great that Senators and Congressmen are being constantly urged by their constituents to open additional lands to settlement, and the sentiment in Congress to open Indian reservations

> has been growing stronger each succeeding year from some years past, until the sentiment now prevails that Indians may only retain what land they actually need and can make proper use of.
>
> I was for many years in favor of leaving the boundaries of Indian reservations undisturbed; but results of the system have caused me to change my mind relative to same, and I now believe, even if such were possible, that large reservations for Indians, much of which is not occupied by them, is not for the best interests of the Indian occupants.
>
> I now believe that it will be manifestly better for the Indians to have their surplus lands opened to settlement, as it brings in white settlers among them, from whom the Indians may more readily acquire the white man's civilization and industrious habits, and it insures a home market for all products raised by the Indians. . . .
>
> You have a very large reservation, certainly much greater than you need and much greater than you will be privileged to retain. . . .

House Report at 23 (A132-A135) (emphasis added.)

Inspector McLaughlin's notes also indicate that a discussion took place involving the impact

that this Court's decision in Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), had on the negotiation process between the federal government and the various Indian tribes. Following discussion of the holding from that decision, Inspector McLaughlin made the following observation:

> This is the situation as to the power of Congress to open the surplus lands of Indian reservations, but the Secretary of the Interior and Commissioner of Indian Affairs desire that Indians be consulted and their views ascertained before legislation is concluded for the opening of their reservations, and this is why I am now here, having been sent to confer with you relative to the proposed legislation affecting your reservation.

House Report at 22 (A129). James Crow Feather, a tribal member attending the discussion at the Cheyenne River Agency, later referred to the Lone Wolf decision in his comments:

> You mentioned Lone Wolf's case in your address here to-day. I wish to say something regarding him. I understand that Lone Wolf refused to sell his land or cede it to the Government, but the Government took it. The way I look at

> that, the Government did right in selling his land if it was necessary to sell it in order to give him a living. I understand that it was taken to the Supreme Court and that it was decided against him. The Government ought not to take our case like Lone Wolf's case. We are willing to give up part of our reservation, but the Government ought to give us time to consider these matters.

House Report at 25 (A145) (emphasis added.) McLaughlin also discussed the Lone Wolf decision with the Standing Rock Tribe at Fort Yates, North Dakota. See, House Report at 9 (A55-A56).

This review of McLaughlin's discussions with the Cheyenne River Sioux Tribe clearly illustrates that McLaughlin's discussions with the Tribe were premised on the assumption that S. 1385 would redraw the boundaries of the Cheyenne Reservation, and that the redrawn boundaries would reduce the size of the reservation. These negotiations were based on the assumption that the land opened to settlement would be ceded by the

tribe to the federal government. The land would therefore no longer be part of the original reservation. It is not possible to read the contemporaneous accounts of McLaughlin's discussions with the Indians and find that the opening of the reservation to settlement by non-Indians did not affect the external boundaries of the original reservation.

2. Inspector McLaughlin's report to the Indian Service.

The same evidence of an intent to diminish the original Cheyenne River Reservation can be found in Inspector McLaughlin's report to the United States Indian Service on his discussions with the Standing Rock and Cheyenne River Sioux Tribes. This report became a part of the House Report that accompanied the 1908 Surplus Lands Act out of committee. House Report at 5-8 (A37-A51).

In his report, McLaughlin detailed the compromise he had formed between the opening of all

unallotted lands, as had been suggested, and the creation of a compact and diminished reservation:

> The opening of the tracts as outlined in blue pencil on the enclosed map would segregate the Standing Rock and Cheyenne River Reservations by opening a strip 18 miles in width between them, and give to each of said agencies legal subdivision outboundaries and compact diminished reservations, ample for the needs of the Indians of the respective reservations, and I am strongly of the opinion that the lines thus suggested would be for the ultimate best interests of the Indians.

House Report at 7 (A35-A36) (emphasis added.) McLaughlin also outlined the diminished Standing Rock Reservation during his discussions in Fort Yates. At one point, he described the unopened portion of the original reservation as "your diminished reservation." House Report at 13, 16-17 (A87-A88, A95-A98). McLaughlin's report to his superiors continued with the following narrative:

> I explained the said Senate and House bills with reference to opening the surplus lands of the Cheyenne River Reservation, as shown by the minutes of the council, transmitted herewith (Exhibit No. 2), and it will be seen from said minutes . . . that the Indians

> realized it would be advisable for them to consent to the opening of a portion of the surplus lands with the hope of thereby securing a diminished reservation.

House Report at 7 (A48) (emphasis added).

McLaughlin expressed the belief throughout his report to his superiors that the proposed legislation would alter the boundaries of the original Cheyenne River Reservation, diminishing a portion of the original 1889 reservation. This expressed belief certainly coincides with both the intentions and beliefs that were present in the earlier discussions between McLaughlin and the Indians, and the language evidencing diminishment that is found on the face of the Act itself.

3. Congressional action on S. 1385.

Inspector McLaughlin's report and notes were made a part of the Senate and House Reports accompanying the 1908 Surplus Lands Act out of committee. Thus, the beliefs and intentions of Inspector McLaughlin as to the scope of the Act

became a part of the express intention of Congress with respect to the Act. There can be no doubt that McLaughlin believed that the intention of the Act was to diminish the original Cheyenne River Reservation. Based on that determination, the only possible conclusion, with respect to congressional intent, is that Congress also intended to diminish the Cheyenne River Reservation.

The debate in neither the Senate nor the House dealt with jurisdiction in the areas opened to settlement by the 1908 Act. 42 Cong. Rec. 4753-4755 (1908); 42 Cong. Rec. 7004-7005 (1908). The comment by United States District Court Judge Andrew Bogue on this lack of concern about jurisdiction is apropos:

> It appears that neither the Senate nor the House at any time debated the specific question of which governmental entity would have jurisdiction over the area to be opened by S. 1385. It appears further that the matter was not discussed by any committee or at least no one deemed it necessary to put the matter into a committee report if it was

> discussed. That is not surprising. If our analysis is correct, it was an assumption shared by all that S. 1385 would diminish the Cheyenne River and Standing Rock Reservations and that lands outside of the diminished reservations, which had not been allotted, would become part of the public domain. When settlers moved in and paid for their quarter sections, title to the land would be transferred in fee to settlers and the power to govern opened areas would lie with the States.

United States v. Juvenile, supra at 1187.

Further evidence of an intent to diminish the original Cheyenne River Reservation is found in the computation of acreage by the Senate Committee on Indian Affairs. This computation was specifically made a part of the House Report. This computation made the following determination of the estimated acreage of the area which was to be reserved "for the use of the Indians upon both reservations as diminished" after the opening of the reservations:

> The Indians upon both reservations are satisfied to have the surplus and unallotted lands disposed of under the provisions of the bill as amended. The

> area as described in the bill amended provides for the opening of a strip of land 18 miles in width running east and west through the entire width of the reservation, and in addition a strip of land on the western part of the two reservations 36 miles wide by 100 miles in length. The total acreage embraced therein and provided to be opened is 2,972,160 acres. Of this amount 1,728,000 acres is in the Cheyenne River Reservation and 1,244,160 acres is in the Standing Rock Reservation. The lands provided to be opened under the provisions of the bill are all within the State of South Dakota, except 365,600 acres in the State of North Dakota.
>
> Should the bill become a law it will leave to the Indian on the Standing Rock Reservation about 1,250,000 acres and to the Indians upon the Cheyenne River Reservation about 1,150,000, which is exclusive of any allotments now taken or which may hereinafter be taken prior to the opening of the lands to settlement in the area to be opened. The lands reserved for the use of the Indians upon both reservations as diminished, in the opinion of your committee and of the Department, are ample and more than sufficient for the present and future needs of the Indians of the respective tribes.

House Report at 3 (A27-A28) (emphasis added).

The significance of the phrase "reservation thus diminished," as used in section 2 of the 1908

Surplus Lands Act, is discussed earlier in this argument. The persuasiveness of this phrase as evidence of an intent to diminish is enhanced by the portion of the House Report set out directly above. The phrase "reservations as diminished," in the context of this excerpt, can mean only a diminished reservation with diminished reservation boundaries. If the phrase did not mean diminished boundaries, the remaining acres would include some of the allotments in the opened area. It is clear from this report, however, that these acres were not included in the acreage computation. Thus, the use of the phrase "reservations as diminished" can mean only that Congress intended to diminish and reduce the original Cheyenne River Reservation, thereby redrawing the outer boundaries of the original reservation.

The unalterable conclusion that one reaches after review of the entire legislative history of the 1908 Surplus Lands Act is that Congress clearly intended to diminish the boundaries of the

original Cheyenne River Reservation when it enacted that Act. This conclusion is consistent not only with words of the Act itself, but also with the historical setting in which the 1908 Surplus Lands Act was enacted.

D. Subsequent Jurisdictional History.

1. Judicial treatment of the opened area: A jurisdictional nightmare.

From the time of the enactment of the 1908 Surplus Lands Act until 1973, the judicial treatment of the area in question was clear and consistent. Since 1973, however, judicial treatment of the jurisdictional question presented in this appeal can best be described as a "jurisdictional nightmare." A review of the judicial treatment of the opened area shows that, from the time of the opening of a portion of the original reservation to settlement until the Court of Appeal's decision in United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973), criminal jurisdiction within the area in question

was considered to rest with the State of South Dakota.

In 1911, the Federal District Court for the District of South Dakota was presented with the question of criminal jurisdiction within the portion of the Cheyenne River Reservation opened by the 1908 Surplus Lands Act. The court, in United States v. LaPlant, 200 F. 92 (D.S.D. 1911), concluded that the boundaries of the original reservation had been diminished; therefore, the federal government did not have jurisdiction in the opened area.

After the LaPlant decision, both the federal and state courts operated under the correct assumption that criminal jurisdiction in the opened area rested with the State. see, State v. Sauter, 48 S.D. 409, 205 N.W. 25 (1925); Lafferty v. State ex rel. Jameson, 80 S.D. 411, 125 N.W.2d 171 (1963); State v. Barnes, 81 S.D. 511, 137 N.W.2d 683 (1965); and United States ex rel. Miner v. Erickson, 428 F.2d 623 (8th Cir. 1970).

In Miner, the Court of Appeals, through Circuit Judge Blackmun, refused to grant habeas corpus relief to a prisoner convicted in a South Dakota state court for a crime committed in Eagle Butte, South Dakota, the site of the crime committed by Bartlett. It was in Miner that the first seeds were sown for the jurisdictional problem that is culminating in this action. Circuit Judge Donald P. Lay dissented in Miner, and in a footnote, suggested that the 1908 Surplus Lands Act may not have diminished the Cheyenne River Reservation. Miner, supra at 637 n. 11 (Lay, J., dissenting).

In 1973, the Court of Appeals acted upon Judge Lay's dissent in Miner, concluding that the area opened to settlement by the 1908 Act was still part of the original Cheyenne River Reservation. Erickson, supra at 689. In 1977, the South Dakota Supreme Court was faced with the same jurisdictional question that is presented in the instant appeal. The consideration of Stankey

v. Waddell, supra, took place after the United States Supreme Court's decisions in DeCoteau and Rosebud Sioux Tribe. The South Dakota Supreme Court, believing that these decisions had some effect on the Court of Appeals' decision in Erickson, did not follow the Court of Appeals, concluding instead that the area opened by the 1908 Surplus Lands Act was no longer part of the original reservation. Stankey, supra at 127.

The Court of Appeals again reviewed the question when it heard the appeal in United States v. Juvenile, supra. District Court Judge Andrew W. Bogue, after an exhaustive examination of the 1908 Surplus Lands Act, its legislative history, the surrounding circumstances and the subsequent jurisdictional events, found that the current Cheyenne River Reservation did not include the portions of the original reservation opened to settlement by the Act. In reviewing the District Court's decision, the Court of Appeals maintained its reliance upon the Erickson

rationale. Based on that precedent, the District Court's decision was overruled. United States v. Dupris, 612 F.2d 319, 320 (8th Cir. 1979). On appeal, this Court granted certiorari. The judgment was then vacated and remanded to the District Court to determine whether the question was moot. Dupris v. United States, 446 U.S. 980 (1980). On remand, the action was dismissed upon the motion of the Government. United States v. Dupris, 664 F.2d 169 (8th Cir. 1981).

Following Dupris, the South Dakota Supreme Court was again presented with the issue of criminal jurisdiction in the opened portion of the original Cheyenne River Reservation. The court vigorously reaffirmed Stankey, while unquestionably condemning the inadequacy of the Court of Appeals' analysis in Erickson. The court concluded:

> We hold that the Surplus Lands Act of 1908, on its face, from surrounding circumstances and legislative history disestablished tribal and federal jurisdiction over unallotted lands on the

> Cheyenne River Indian Reservation. Thus, the legislative intent sufficiently expresses a policy of disestablishment to override the rule of construction that ambiguities and doubtful expressions are resolved favorably to the Indians.

State v. Janis, supra at 137.

Soon after the Janis decision was issued, the present action began in United States District Court for the District of South Dakota. In affirming the decision of District Judge Donald J. Porter, the Court of Appeals again relied upon its Erickson decision, and found no congressional intent to diminish the original Cheyenne River Reservation. Bartlett, supra at 421.

It is clear that for nearly sixty years, the legal jurisdiction on the opened portion of the original reservation rested with the State of South Dakota. Even after the Court of Appeals' decision in Erickson, South Dakota's court system, using the guidelines set by this Court in Rosebud Sioux Tribe and DeCoteau, has consistently found state jurisdiction in the opened areas of the original reservation through well-reasoned and

logical decisions. The finding of an intent to diminish is consistent with the words of the 1908 Surplus Lands Act, the definition given to those words by the historical context surrounding the passage of the Act, and the legislative history of the Act itself.

2. Subsequent legislative action.

A review of the most relevant piece of legislative action dealing with the diminished Cheyenne River Reservation clearly supports the argument that Congress intended to diminish the original reservation through the 1908 Surplus Lands Act. In 1910, Congress enacted a prohibition against the introduction of intoxicants into the opened portion of the original reservation. Act of February 17, 1910, 36 Stat. 196. The significance of this amendment is discussed above in detail. It should be noted again, however, that this Court found a similar provision in the 1910 Rosebud Act, Act of May 30, 1910, 36 Stat. 448,

to be an expression of a congressional intent to diminish the original Rosebud Reservation. Rosebud Sioux Tribe, 430 U.S. at 613-615.

3. Subsequent executive action.

The following review of subsequent executive department actions with regard to the portion of the original Cheyenne River Reservation opened by the 1908 Surplus Lands Act illustrates that these actions are consistent with the intent to diminish that was evidenced at the time of the original opening of the reservation:

a. Tribal Constitution and Bylaws. On December 27, 1935, the Secretary of Interior approved a constitution and bylaws for the Cheyenne River Sioux Tribe which gave the Tribe jurisdiction over the confines of the original reservation boundaries. However, this Court has not found similar executive department action to be supportive of an intent to diminish. Rosebud Sioux Tribe, 430 U.S. at 616 n. 1.

b. BIA Agency location. The location of the Bureau of Indian Affairs Agency at Eagle Butte, which is within the area opened by the 1908 Act, does not evidence a belief on the part of the federal government that the reservation boundaries were not diminished and redrawn by the Act. Federal law does not require the agency to be built "on the reservation." The applicable statute requires that the "agent for said Indians . . . reside among [the Indians]." 15 Stat. at 636. Eagle Butte is the geographic and demographic center of the original Cheyenne River Reservation, and was well-suited as an agency location. At that time, it was the only community in this rural area with the support services necessary for an Agency location. It also fulfills the requirements set by statute.

c. Restoration of opened lands. In 1934, Congress provided that lands in portions of reservations, which had been opened for settlement and which had never been purchased, could

be returned to the tribe "if [the Secretary of the Interior found] it to be in the public interest." 25 U.S.C. § 463. A 1934 decision by the Solicitor of the Department of Interior states that the land subject to a prior cession could not be subsequently restored to an Indian reservation. 54 Interior Dec. 559, 560 (1934). However, the restoration of the lands to the tribe by the Secretary of Interior does not evidence a belief that the boundaries of the original reservation were not changed. A later decision by the Solicitor of the Interior Department determined that it was not a prerequisite to restoring lands to Indians under 25 U.S.C. § 463 that the land still be a part of a reservation. 56 Interior Dec. 330, 333 (1938). It is further suggested that the Secretary of Interior's orders restoring plots of land to the Cheyenne River Sioux Tribe are inconclusive as to the intent to diminish. In some cases the Secretary referred to the areas opened by the 1908 Act as part of the reservation. The

same orders, however, also refer to the opened area as "ceded land" and as being outside the "existing reservation." 32 Fed. Reg. 14,276 (1967); 22 Fed. Reg. 3693 (1957).

CONCLUSION

The United States Court of Appeals for the Eighth Circuit has again misapplied the analysis required in diminishment questions as set forth in the decisions of this Court. In United States ex rel. Condon v. Erickson, supra, United States v. Dupris, supra, and Bartlett v. Solem, supra, the Court of Appeals has either ignored or overlooked very strong and convincing evidence of a congressional intent to diminish the original Cheyenne River Reservation. This Court, in Rosebud Sioux Tribe, supra, and DeCoteau, supra, set forth guidelines that courts must follow when interpreting Acts of Congrss which opened the original boundaries of established Indian reservations to settlement by non-Indians.

The Court of Appeals has not followed these guidelines in its interpretation of the 1908 Surplus Lands Act, Act of May 29, 1908, 35 Stat. 460, which so opened portions of the original Cheyenne River Reservation.

The foregoing analysis highlights the clear evidence of an intent to diminish which exists in regard to the 1908 Surplus Lands Act. Specific words and phrases of the Act itself and the amendments thereto evidence the intent to diminish the boundaries of the original reservation.

In addition, the 1908 Surplus Lands Act at question in this appeal is just one of many similar Surplus Lands Acts enacted during the same historical era. This era was highlighted by "familiar forces," which worked against the continued viability of large Indian reservations. These other acts diminished the boundaries of the reservations they affected. See, Rosebud Sioux Tribe, supra; DeCoteau, supra; United States ex rel. Cook v. Parkinson, supra. The historical

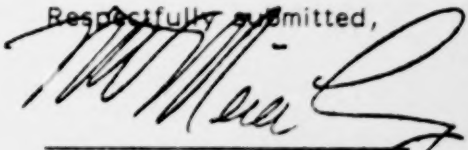
setting in which the 1908 Surplus Lands Act was enacted supports the intent to diminish found on the face of the Act.

Further, a review of the legislative history of the Act, including the notes and reports of Inspector James McLaughlin from his discussions with the Standing Rock and Cheyenne River Sioux Tribes, supports the intent to diminish found on the face of the Act itself. These reports and notes, which are a part of both the House and Senate Reports that accompanied the 1908 Surplus Lands Act out of committee, unquestionably support the claim that Congress intended, with the passage of the 1908 Surplus Lands Act, to diminish the boundaries of the original Cheyenne River Reservation.

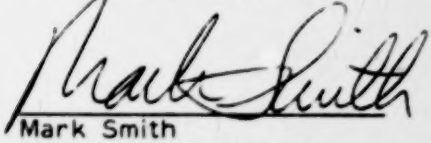
Finally, a review of the subsequent legislative, executive and judicial treatment of the area in question also unmistakenly supports an intent to diminish the original reservation.

Based on the foregoing arguments and authorities, Petitioners Solem and Meierhenry respectfully request that this Court reverse the decision of the United States Court of Appeals for the Eighth Circuit, find that the original boundaries of the Cheyenne River Reservation have been diminished, find that the State of South Dakota has criminal jurisdiction over the opened area, and deny Respondent Bartlett's Petition for Writ of Habeas Corpus.

Respectfully submitted,



MARK V. MEIERHENRY
ATTORNEY GENERAL



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August, 1983

APPENDIX

APPENDIX A

Act of May 29, 1908, 35 Stat. 460.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell and dispose of all that portion of the Cheyenne River and Standing Rock Indian reservations in the States of South Dakota and North Dakota lying and being within the following described boundaries, to-wit: Beginning at a point on the one hundred and second meridian of longitude west, where the township line between townships nine and ten north intersects the same; thence east on said township line to a point where the same intersects the range line between ranges twenty-four and twenty-five east of the Black Hills meridian; thence north on said range line to a point where the same intersects the township line

between townships fifteen and sixteen north; thence east along said township line to a point in the center of the main channel of the Missouri River; thence in a northerly direction along the center of the main channel of said Missouri River to a point where the township line between townships eighteen and nineteen north intersects the same, and including also entirely all islands, if any, in said river; thence west on said township line to a point where the range line between ranges twenty-two and twenty-three east intersects the same; thence north along said range line to the northwest corner of section nineteen in township twenty-one north of range twenty-three east; thence east on the section line north of sections nineteen, twenty, twenty-one, twenty-two, twenty-three and twenty-four to a point where the same intersects the range line between ranges twenty-three and twenty-four east; thence

north along said range line to the State line between the States of South Dakota and North Dakota; thence west on said State line to a point where the range line between ranges eighty-four and eighty-five west in North Dakota intersects the same; thence north on said range line to a point where said range line intersects the center of the main channel of the South Fork of the Cannon Ball River; thence in a westerly direction up and along the center of the main channel of the said river to a point where the same intersects the one hundred and second meridian of longitude west; thence south along said one hundred and second meridian of longitude west; thence south along said one hundred and second meridian of longitude west to the place of beginning, except such portions thereof as have been alloted to Indians: Provided, that sections sixteen and thirty-six of the lands in each township therein shall not be disposed of, but shall be reserved for the use of the common schools of the

States of South Dakota and North Dakota, as the same may be located in the said States, respectively: Provided further, That the Secretary of the Interior may reserve such lands as he may deem necessary for agency, school, and religious purposes, to remain reserved as long as needed, and as long as agency, school, or religious institutions are maintained thereon for the benefit of said Indians: Provided, however, that the Secretary of the Interior is hereby authorized and directed to issue a patent in fee simple to the duly authorized missionary board, or other proper authority of any religious organization heretofore engaged in mission or school work on said reservations, for such lands thereon (not included in any town site herein provided for) as have been heretofore set apart to such organization for mission or school purposes.

SEC. 2. That the lands shall be disposed of by proclamation under the general provisions of the homestead and town-site laws of the United

States, and shall be opened to settlement and entry to proclamation of the President, which proclamation shall prescribe the manner in which the lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation: Provided, That prior to the said proclamation the Secretary of the Interior, in his discretion, may permit Indians who have an allotment within the area described in section one of this Act to relinquish such allotment and to receive in lieu thereof an allotment anywhere within the respective reservations thus diminished to which reservation the said Indians may belong: Provided further, That prior to the said proclamation the Secretary of the Interior shall cause allotments to be made to every man, woman, and child belonging to or holding tribal relations in said Cheyenne River and Standing Rock reservations who have not

heretofore received the allotments to which they are entitled under provisions of existing laws: Provided futher, That the Secretary of the Interior be, and he is hereby, authorized and directed to cause to be surveyed all the lands embraced within said reservations, and to cause an examination to be made of the lands by experts of the Geological Survey, and if there be found any lands bearing coal, the said Secretary is hereby authorized to reserve them from allotment or disposition until further action by Congress: Provided further, That the rights of honorably discharged Union soldiers and sailors of the late civil and Spanish wars or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged.

SEC. 3. That the price of said lands entered as homesteads under the provisions of this Act shall be fixed by appraisement as herein provided. The President of the United States shall appoint two commissions, one for each reservation, each commission to consist of three persons to inspect, appraise, and value all of said lands that shall not have been allotted in severalty to said Indians, or reserved by the Secretary of the Interior or otherwise disposed of, and excepting sections sixteen and thirty-six in each of said townships, each commission to be constituted as follows: One resident citizen of the States of North or South Dakota, one representative of the Indian Bureau and one person holding tribal relations with one of said tribes of Indians. That within twenty days after their appointment the said commissioners so appointed for each of the said reservations, respectively, shall meet and organize by the election of one of their number as chairman. Each commission is hereby

empowered to select such clerks and assistants at such compensation as the Secretary of the Interior may approve. That said commissioners shall then proceed to personally inspect, classify, and appraise, in one hundred and sixty acre tracts each, all of the remaining lands embraced within each reservation as described in section one of this Act. In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, grazing land, fourth, timber land; fifth, mineral land, if any, the mineral land not to be appraised. That said commissioners shall be paid a salary of not to exceed ten dollars per day each while actually employed in the inspection and classification of said lands and necessary expenses to be approved by the Secretary of Interior; such inspection and classification to be completed within six months from the date

of the organization of said commissions respectively, and no compensation shall be paid to either the commissioners or employees after the said six months. That when said commissions shall have completed the classification and appraisement of all of said lands the same shall be subject to the approval of the Secretary of the Interior.

SEC. 4. That the price of said lands shall be paid in accordance with the rules and regulations to be prescribed by the Secretary of the Interior upon the following terms: One fifth of the purchase price to be paid in cash at the time of entry, and the balance in five equal annual installments, to be paid in one, two, three, four, and five years, respectively, from and after the date of entry. In case any entryman fails to make the annual payments, or any of them, when due, all rights in and to the land covered by his entry shall cease, and any payments theretofore made shall be forfeited and entry canceled, and

the lands shall be reoffered for sale and entry under the provisions of the homestead law at the appraised price thereof: And provided, That nothing in this Act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed herein, receiving credit for payments previously made. In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law, where the price of land is one dollar and twerty-five cents per acre, and when the entryman shall have complied with all the requirements and terms of the homestead laws as to settlement and residence and shall have made all the required payments aforesaid he shall be entitled to a patent for the lands entered: And provided further, That all lands remaining undisposed of at

the expiration of four years from the opening of said lands to entry may, in the discretion of the Secretary of the Interior, be reappraised in the manner provided for in this Act. And it is further provided that any lands remaining unsold after said lands have been open to entry for seven years may be sold to the highest bidder for cash without regard to the prescribed price thereof fixed under the provisions of this Act, under such rules and regulations as the Secretary of the Interior may prescribe.

SEC. 5. That the Secretary of the Interior is authorized to reserve from said lands such tracts for townsite purposes as in his opinion may be required for the future public interests, and he may cause the same to be surveyed into blocks and lots and disposed of under such regulations as he may prescribe, in accordance with section twenty-three hundred and eighty-one of the United States Revised Statutes. The net proceeds

derived from the sale of such lands shall be credited to the Indians as hereinafter provided.

Sec. 6. That from the proceeds arising from the sale and disposition of the lands aforesaid, exclusive of the customary fees and commissions, there shall be deposited in the Treasury of the United States, to the credit of the Indians belonging and having tribal rights on the reservations aforesaid in the States of South Dakota and North Dakota the sums to which the respective tribes may be entitled, which shall draw interest at three per centum per annum; that the moneys derived from the sale of said lands and deposited in the Treasury of the United States to the credit of said Indians respectively shall be expended for their benefit under the direction of the Secretary of the Interior.

SEC. 7. That sections sixteen and thirty-six of the land in each township within the tract described in section one of this Act shall not be

subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at one dollar and twenty-five cents per acre, and the same are hereby granted to the States of South Dakota and North Dakota for such purpose as the same are located in the said States respectively; and in case any of said sections, or parts thereof, are lost to said States by reason of allotments thereof to any Indian or Indians, or otherwise, the governors of said States, respectively, with the approval of the Secretary of the Interior, are hereby authorized, within the area in the respective States described in section one of this Act, to locate other lands not occupied not exceeding two sections in any one township, which shall be paid for by the United States as herein provided, in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement.

SEC. 8. That there is hereby appropriated, out of any money in the Treasury not otherwise

appropriated, the sum of not more than two hundred and twenty-five thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the States of South Dakota and North Dakota, as provided in section seven of this Act. And there is hereby appropriated the further sum of seventy-five thousand dollars, or so much thereof as may be necessary, for the purpose of making the appraisement and classification and allotments provided for herein: Provided, That the latter appropriation, or any futher appropriation hereafter made for the purpose of carrying out the provisions of this Act, shall be reimbursed to the United States from the proceeds received from the sale of the lands described herein or from any money in the Treasury belonging to said Indian tribes respectively.

SEC. 9. That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or

the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of the said lands and to expend and pay over the proceeds received from the sale thereof only as received and as herein provided: Provided, That nothing in this Act shall be construed to deprive the said Indians of the Cheyenne River or Standing Rock Indian reservations, in South Dakota and North Dakota, of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this Act: Provided, That Indians residing upon their allotments in townships sixteen north of ranges twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty, and thirty-one east shall have the right to use timber in said townships, except on

sections sixteen and thirty-six for domestic purposes only as long as the lands remain part of the public domain.

Approved, May 29, 1908.

APPENDIX B

Act of February 17, 1910, 36 Stat 196.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section seven and eight of the Act of May twenty-ninth, nineteen hundred and eight, entitled "An Act to authorize the sale and disposition of a portion of the surplus and unallotted lands in the Cheyenne River and Standing Rock Indian reservations in the States of South Dakota and North Dakota, and making appropriation and provision to carry the same into effect," are amended and as so amended are reenacted to read as follows:

Sec.7. That sections sixteen and thirty-six of the land in each township within the tract described in section one of this Act shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per

acre, and the same are hereby granted to the States of South Dakota and North Dakota for such purpose as the same are located in the said States, respectively; and in case any of said sections, or parts thereof, are lost to said States by reason of allotments thereof to any Indian or Indians, or otherwise, the governors of said States, respectively, with the approval of the Secretary of the Interior, are hereby authorized, within the area in the respective States described in section one of this Act, to locate other lands not occupied not exceeding two sections in any one township, which shall be paid for by the United States as herein provided, in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement.

Sec. 8. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of not more than four hundred and fifteen thousand dollars, or so much

thereof as may be necessary, to pay for the lands granted to the States of South Dakota and North Dakota, as provided in section seven of this Act. And there is hereby appropriated the further sum of seventy-five thousand dollars, or so much thereof as may be necessary, for the purpose of making the appraisement and classification and allotments provided for herein: Provided, That the latter appropriation, or any further appropriation hereafter made for the purpose of carrying out the provisions of this Act, shall be reimbursed to the United States from the proceeds received from the sale of the lands described herein or from any money in the Treasury belonging to said Indian tribes, respectively: And provided further, That the lands allotted, those retained or reserved, and the surplus lands sold, set aside for town-site purposes, or granted to the said States, or otherwise disposed of under the provisions of this Act, shall be subject for a period of twenty-five years to all the laws of the

United States prohibiting the introduction of intoxicants into the Indian country.

Approved, February 17, 1910.

APPENDIX C

60th Congress,) HOUSE OF REPRESENTATIVES
1st Session.) Report
No. 1539.

SALE OF PORTION OF SURPLUS LANDS ON CHEYENNE RIVER AND STANDING ROCK RESERVATIONS

April 20, 1908.--Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. Marshall, from the Committee on Indian Affairs, submitted the following

REPORT.

[To accompany S. 1385.]

The Committee on Indian Affairs, to whom was referred the bill (S. 1385) to authorize the sale and disposition of a portion of the surplus and unallotted lands on the Cheyenne River and Standing Rock Indian reservations in the States of South Dakota and North Dakota, and making appropriation and provision to carry the same into

effect, having had the same under consideration, beg leave to report that said bill do pass with the following amendments:

Page 4, strike out all after the word "reservations" in lines 6, 7, and 8.

Page 4, lines 18, 19, and 20, strike out the words "under the homestead laws in accordance with the coal-land laws of the United States for the benefit of the tribes in common" and insert in lieu thereof "until further action by Congress."

Page 5, line 13, strike out the word "State" and insert the words "States of North or."

Page 5, line 18, after the word "meet," strike out all down to and including the word "commission" in line 21.

Page 5, line 21, strike out the word "shall" and insert the word "and" in lieu thereof.

Page 5, lines 23, 24, and 25, strike out the words "as may be necessary at a salary of not to exceed $5 per day, subject to the approval of" and insert in lieu thereof the words "and at such compensation as."

Page 5, line 25, after the word "Interior," insert the words "may approve."

Page 6, line 15, after the word "respectively," insert the words "and no compensation shall be paid to either the Commissioners or employees after the expiration of the said six months."

Page 7, line 1, strike out the word "promptly."

Page 7, line 21, after the word "may" insert the words "in the discretion of the Secretary of the Interior."

Page 8, line 17, after the word "Dakota," strike out the word "as" and insert the words "the sums to which" in lieu thereof.

Page 8, line 18, strike out the word "thereto."

Page 8, line 19, 20, and 21, strike out the words "the interest to be paid to the Indians per capita in cash annually, share and share alike."

Page 8, line 25, after the word "Interior," strike out the words "and he may, in his discretion, upon an application;" and strike out all of lines 1, 2, 3, and 4 on page 9.

Page 9, line 9, strike out the words "and fifty cents."

Page 10, line 1, strike out the word "four" and insert the words "not more than three."

Page 10, line 1, strike out "fifteen" and insert "fifty" in lieu thereof.

Page 10, line 9, after the word "appropriation," insert the words "or any further appropriation hereafter made for the purpose of carrying out the provisions of this act."

Page 10, line 22, after the word "received," insert the word "and."

This bill provides for opening by proclamation of the President, for settlement by homesteaders, of portions of the Standing Rock Indian Reservation in North and South Dakota and the Cheyenne Indian Reservation in South Dakota.

Provision is made for allotments to be made to all the Indians of both reservations and also for exchange of allotments on the part of those who desire to exchange, and the remaining lands, except sections 16 and 36, are to be classified and appraised by two commissions, one for each reservation, consisting of three persons, made up of one resident of North or South Dakota, one Indian, and one representative of the Indian Department. The lands are to be classified, first, into agricultural lands of the first class; second, agricultural lands of the second class; third, grazing lands; fourth, timber lands, and, fifth, mineral lands, which latter are not to be disposed of or appraised.

The lands shall be paid for by the homesteader at the appraised price, one-fifth of the purchase price in cash and the balance in five equal annual installments. The lands remaining undisposed of at the expiration of four years from the opening may be reappraised, in the discretion

of the Secretary of the Interior, and the lands remaining unsold after seven years may be sold to the highest bidder for cash, without regard to price, under rules and regulations prescribed by the Secretary of the Interior.

Proceeds from the sale of the lands shall be placed to the credit of the Indians and draw interest at the rate of 3 per cent per annum.

Sections 16 and 36 are reserved as school lands for the States of North Dakota and South Dakota, which is in accordance with the enabling acts of these States. An appropriation is made to pay the Indians for these lands at the rate of $2 per acre.

An appropriation is also made to cover the expenses of the two commissions to classify and appraise the land, but this appropriation is reimbursement out of the proceeds of the sale of the lands.

The Secretary of the Interior is authorized to reserve such tracts for town-site purposes as may be required for future public interests.

Section 9 provides that the United States shall in no manner be bound to purchase any portions of the lands except sections 16 and 36, or their equivalent in each township, or assume any other obligation other than as trustee for said Indians to dispose of the lands and expend and pay over the proceeds received from the sale thereof only as received.

Your committee adopts the following portions of the Senate Report No. 439, from the Committee on Indian Affairs, and part 2, Senate Report No. 439, from the same committee:

> The Indians upon both reservations are satisfied to have the surplus and unallotted lands disposed of under the provisions of the bill as amended. The area as described in the bill as amended provides for the opening of a strip of land 18 miles in width running east and west through the entire width of the reservation, and in addition a strip of land on the western part of the two reservations 36 miles wide by 100 miles in length. The total acreage embraced therein and provided to be opened is 2,972,160 acres. Of this amount 1,728,000 acres is in the Cheyenne River Reservation and 1,244,160 acres is in the Standing Rock Reservation.

The lands provided to be opened under the provisions of the bill are all within the State of South Dakota, except 365,600 acres in the State of North Dakota.

Should the bill become a law it will leave to the Indians on the Standing Rock Reservation about 1,250,000 acres and to the Indians upon the Cheyenne River Reservation about 1,150,000, which is exclusive of any allotments now taken or which may hereafter be taken prior to the opening of the lands to settlement in the area to be opened. The lands reserved for the use of the Indians upon both reservations is diminished, in the opinion of your committee and of the Department, are ample and more than sufficient for the present and future needs of the Indians of the respective tribes. It is of the utmost importance for the upbuilding and development of the particular region of the States of South Dakota and North Dakota that the bill should pass and that these lands should be opened to settlement. It is believed that such opening will not only prove a great benefit and advantage to the people of the States and to prospective settlers, but to the Indians themselves. It will afford an immediate opportunity for the settlement and development of this vast area, which will not only bring added wealth to the States, but to the holdings and property of the Indians themselves.

Although Congress has plenary power to open the lands independent of the consent or agreement of the Indians, it has been thought wise to

consult their wishes and conform thereto as nearly as may be consistent with their own interest and the welfare of the people as a whole. In the opinion of the committee, the provisions of the bill are just and equitable to the Indians and believe they will be to the prospective settlers.

A great railway system has recently been extended westward to the Pacific through the Standing Rock Indian Reservation and extends through the lands on that reservation proposed to be opened. It is hoped, should the bill become a law and the lands opened as is proposed, other railways will be extended west of the Missouri River through the lands opened to settlement, which will lead to a rapid development of the northwestern section of the State of South Dakota and greatly benefit the Indians not only upon the lands opened to settlement, but also the holdings of the Indians upon the reduced reservations.

The bill has the earnest and cordial support of the Department, and there are herewith submitted and made a part of this report communications from the Secretary of the Interior and Commissioner of Indian Affairs.

Department of the Interior, Washington, December 26, 1907.

Sir: I am in receipt of a copy of S. 1385, entitled "A bill to authorize the sale and disposition of a portion of the surplus and unallotted

lands in the Cheyenne River and Standing Rock Indian reservations, and making appropriation and provision to carry the same into effect," transmitted by you on December 20, 1907, with request for report.

In response I beg to advise you that I sincerely hope that the Congress will defer action on this measure for a short time because instructions have been given an experienced Indian inspector to confer with the Indians of these two reservations for the purpose of obtaining definite knowledge as to their wishes. I am induced to follow the course in part by the fact that I have been advised that these Indians may desire to cede a greater area than the bill covers, and I am anxious to comply with their wishes in this regard if it is practicable.

As soon as the inspector reports, which will be in a short time, it will be forwarded to you

with appropriate recommendations in connection with this bill.

Very respectfully,

Frank Pierce, Acting Secretary.
Hon. Moses E. Clapp, Chairman
Committee on Indian Affairs,
United States Senate.

Department of Interior,
Office of Indian Affairs,
Washington, March 30, 1908.

Sir: I am in receipt of a copy, revised by you, of S. 1385, entitled "A bill to authorize the sale and disposition of a portion of the surplus and unallotted lands in the Cheyenne River and Standing Rock Indian reservations, in the States of South Dakota and North Dakota, and making appropriation and provision to carry the same into effect," with request for comment.

Certain amendments have been made to the bill as originally introduced in the Senate to meet the views of the Indians of these reservations as to the form of legislation which should be enacted and the lands to be opened.

If the bill in its present form is enacted into law a strip of land about 18 miles in width running east and west, through the entire width of the reservation will be opened to settlement and entry, in addition to a strip 36 miles wide on the extreme western part of both reservations.

Provision is made for the allotment of each man, woman, and child belonging to or holding tribal rights on the reservations who have not heretofore received allotments, in accordance with the provisions of existing laws. The surplus lands are to be disposed of under the provisions of the homestead laws at a price to be fixed by a commission whose duty it shall be to appraise the surplus lands. Sections 16 and 36 of each township are granted to the respective States wherein they lie, to be paid for by the United States at the rate of $2.50 per acre.

Provision is made also for the reservation of such lands for town-site purposes as in the opinion of the Secretary of the Interior may be

required for the future public interests, and for their sale in accordance with section 2381 of the Revised Statutes. The proceeds of the sale of the surplus lands and the town sites are to be placed to the credit of the Indians of the respective reservations in the Treasury of the United States and will draw interest at the rate of 3 per centum per annum.

An appropriation of $75,000, or so much thereof as may be necessary, is made to pay for the lands granted to the States of South Dakota and North Dakota, and a further appropriation of $20,000, or so much thereof as may be necessary, for the purpose of making the appraisement, classification, and allotments provided for in the act, the latter appropriation to be reimbursed to the United States from the sale of the lands to be opened to settlement and entry.

From the reports which the Office has received it appears that there are valuable coal lands on these reservations, and I am of the

opinion that provision should be made in the bill for the reservation of such lands for the benefit of the tribes in common.

As all the lands of the reservations have not been surveyed, I believe that provision should be made in the bill providing therefor.

I therefore recommend that the bill be amended by inserting the following clause after the word "laws," in line 24, page 2:

"Provided further, That the Secretary of the Interior be, and he is hereby, authorized and directed to cause to be surveyed all the lands embraced within said reservations, and to cause an examination to be made of the lands by experts of the Geological Survey, and if there be found any lands bearing coal the said Secretary is hereby authorized to reserve them from allotment or disposition under the homestead laws, to be disposed of in accordance with the coal-land laws of the United States for the benefit of the tribes in common."

The sum appropriated by the bill will be entirely inadequate to pay for the lands granted by the tribes to the States for school purposes, as the total acreage granted will approximate 166,000 acres. To pay for them at the rate of $2.50 per acre would require $415,000. I therefore recommend that the word "seventy-five" in line 6, page 8, be stricken out and the words "four hundred and fifteen" inserted in lieu thereof.

A much larger appropriation will be necessary to survey the lands and carry out the other provisions of the act.

I therefore recommend that the word "twenty," in line 9, page 8, be stricken out and the word "seventy-five" inserted in lieu thereof.

The bill as handed in by you for my examination seems to be satisfactory, so far as I can see, but it is understood that some suggestions are on the way from the field which it may be desirable to consider. If these should be of such

importance as to render it desirable to alter the bill in any respect it could be done either by recommittal in committee or on the floor, as may seem to you expedient.

Very respectfully,

F. E. Leupp, Commissioner.
Hon. Robert J. Gamble,
United States Senate.

[Senate Report 439, Part 2, Sixtieth Congress, first session.]

Mr. Gamble, from the Committee on Indian Affairs, submitted the following supplemental REPORT.

[To accompany S. 1385.]

The Committee on Indian Affairs, to whom was referred the bill (S. 1385) to authorize the sale and disposition of a portion of the surplus and unallotted lands on the Cheyenne River and Standing Rock Indian reservations in the States of South Dakota and North Dakota, and making appropriation and provision to carry the same into

effect, beg leave to submit the following papers as a supplemental report:

Department of the Interior,
United States Indian Service.
Washington, D.C., March 30, 1908.

Sir: Under departmental instructions of December 26, 1907, and March 4, 1908, respectively, I have the honor to report the result of councils held by me with the Indians of the Standing Rock and Cheyenne River reservations in the States of North and South Dakota, with reference to the opening of the surplus lands of the two said reservations to settlement, as contemplated by Senate bill 1385 and House bills 17825 and 17884. Sixtieth Congress, first session, copies of which bills were furnished me to submit and explain to the said Indians.

I met the Indians of the Standing Rock Reservation in council at Fort Yates, N.Dak. on the 9th instant, with a very full attendance of the leading men of the reservation present, which

council was convened at 1 o'clock p.m. on Monday, the 9th instant, and adjourned sine die at 11:10 p.m. on Tuesday, the 10th.

As may be seen by the council's minutes transmitted herewith (Exhibit No. 1), the provisions of the bills referred to were clearly explained and fully discussed, and after the Indians were brought to understand the various phases of the question they met the wishes of Congress very commendably by consenting to what would seem to be a reasonable compromise between the said Senate and House bills.

After a careful study of the proposed legislation and being quite familiar with the conditions prevailing in the Standing Rock and Cheyenne River reservations, and also showing that the area of these two reservations was much greater than the Indians can make proper use of, and that the opening of some of the surplus lands is demanded in the development of that section of the country, I deemed it best to submit a definite

proposition as to the tract I thought the Indians should relinquish, and therefore suggested that they relinquish all the surplus lands of their reservation lying west of the line dividing ranges 23 and 24 in South Dakota and ranges 84 and 85 in North Dakota, together with one tier of townships lying along the southern boundary of their reservation, after allotments to those entitled thereto have been completed.

In order that the Indians might fully understand the boundaries of the proposed diminished reservation I indicated with a blue pencil on a map of South Dakota the area which I believed would be to the best interests of the Indians to relinquish, which map I transmit herewith (Exhibit No. 3). The area indicated by blue-pencil line on said map was clearly explained to the Standing Rock Indians, as may be seen by reference to pages 4 to 17, inclusive, of the council minutes (Exhibit No. 1).

After I had submitted the question and fully explained the proposed legislation to those assembled, a recess was taken for the purpose of enabling the Indians to discuss the matter among themselves. And, as may be seen by the council minutes, they, in tribal council, agreed to the opening of the western portion of their reservation, lying west of the line dividing ranges 21 and 22 in South Dakota and ranges 86 and 87 in North Dakota, being four tiers of full townships, together with a fractional tier of townships lying along the western boundary of the reservation, the tract thus decided upon by the Indians being about 25 miles in width on the western portion of their reservation, or a total of about 29 townships.

The Indians in conference selected four of their people and instructed them what to say with reference to the question submitted, namely, Arthur Tibbets, Thomas Frosted, Antoine Derockbrain, and John Grass, who announced

what had been agreed upon, and whose speeches appear on pages 6 to 17, inclusive, of the council minutes. They demanded that payment be made to the Indians annually from the proceeds of the sale of the lands disposed of instead of depositing it in the United States Treasury to their credit, to draw interest at 3 per cent per annum for ten years, as provided by section 6 of said bills; also, that they receive $2.50 per acre for sections 16 and 36 of the lands in each township reserved for the use of the common schools of the respective States in which the lands are situated, instead of $1.25 per acre, as provided in said bills.

With the exception of these two provisions, the said bills met with the general concurrence of the Indians, but they desired it made clear that all persons entitled to allotments should be privileged to make their selections anywhere within the reservation as it now exists.

Replying to their request for annual payments from the proceeds of the lands and the higher price for the school sections than provided in the bills, I promised the Indians that I would report their contention regarding these two questions, and would submit the following memorandum with reference to the proposed interest-bearing fund, with the recommendation that it be substituted for the said provision:

"That the proceeds derived from the sale of said lands shall be expended for the benefit of the Standing Rock Indians, in the discretion of the Secretary of the Interior, upon an application to the Department annually by a majority petition of the said Indians, through the Indian agent in charge of the Standing Rock Reservation and upon his recommendation."

And to meet their wishes in regard to the double minimum price for sections 16 and 36 of each township within the tract relinquished, I promised to recommend the following:

"That sections sixteen and thirty-six of the lands in each township of the tract relinquished shall not be subject to entry but shall be reserved for the use of the common schools of the States of North and South Dakota, respectively, for the State in which the lands relinquished are situated, and paid for by the United States at two dollars and fifty cents per acre, and in case any of said sections or parts thereof, of the land in the tract relinquished, are lost to the States aforesaid by reason of the allotment thereof to Indians or otherwise, the governors of the said respective States with the approval of the Secretary of the Interior, may locate other lands of similar character and equal value not occupied, and not exceeding two sections in any one township, which shall be paid for by the United States, as herein provided in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement."

After the four speakers had expressed themselves in favor of relinquishing but twenty-nine townships of land, I stated my views very clearly as to the various phases of the question under consideration, whereupon Thomas Frosted, one of the four said spokesmen for the council, expressed his individual views, favoring the opening of the tract indicated in blue pencil on the inclosed map, and he was followed by Siaka, one of the leading Indians of the reservation, who also strongly spoke in favor of the cession thus indicated.

Just previous to the adjournment of our council on the evening of the 10th instant I notified the Indians that I would remain at the agency the following day, and that I would be pleased to respond to any call they might make for additional information. Early in the morning of the 11th, One Bull, a nephew of Sitting Bull and who succeeded that noted Indian as chief of the Sitting Bull band, called upon me and stated

that he favored the lines suggested by me from the beginning and advocated it in the tribal council, but did not have sufficient support to carry his motion by a majority vote of the Indians present. He then requested me to prepare a paper which he, together with others who wished to concur in the lines suggested by me, might sign. I prepared the paper as requested by One Bull, and it was immediately signed by ninety of the Indians of those who had attended the councils of the two previous days, and which paper is transmitted herewith (Exhibit No. 4).

A number of Indians who had not been present at the council, upon learning the proceedings of our two days' conference, suggested that I prepare another paper for circulation among the Indians of the reservation who had not attended the conferences, to be accompanied by a copy of the minutes of the council, which I did, and which was sent out by Agent Belden to the several substations of the reservation for the

signatures of those who concurred in the suggested lines, and which petition, containing 220 signatures, is also transmitted herewith (Exhibit No. 5).

The Indians of the Upper Grand River prepared another paper, which provided for the relinquishment of similar acreage, with a slight change as to certain of the townships, and circulated it for signatures, they desiring to retain townships 18, 19, 20, and 21, range 23, in South Dakota, and giving townships 129 and 130, ranges 83 and 84, in North Dakota, in lieu thereof, which petition, containing 212 signatures, is also transmitted herewith (Exhibit No. 6), being 522 of the 973 male adult Indians of that reservation who have signified their willingness to have certain of their surplus lands opened to settlement, a majority of 70.

In this connection I desire to state that the Indians who signed this last-mentioned petition all reside along Grand River and its tributaries, and

in order to save the townships adjoining their homes for stock ranges, they decided upon substituting a similar number of townships in North Dakota without consulting the Indians of the Cannon Ball district, whose interests were more seriously affected thereby.

The opening of the tracts as outlined in blue pencil on the inclosed map would segregate the Standing Rock and Cheyenne River reservations by opening a strip 18 miles in width between them, and give to each of said agencies legal subdivision outboundaries and compact diminished reservations, ample for the needs of the Indians of the respective reservations, and I am strongly of the opinion that the lines thus suggested would be for the ultimate best interests of the Indians.

After concluding my work at the Standing Rock Reservation, as above set forth, I proceeded to the Cheyenne River Reservation, where I expected to find all the leading Indians of the

reservation assembled to meet me, I having notified Superintendent Rastall to that effect some days previous, but was greatly disappointed upon my arrival at finding only 63 Indians at the agency. Upon inquiry I learned that owing to the breaking up of the ice in the streams and the bad condition of the roads, it was with considerable difficulty that even this number was present.

I reached the Cheyenne River Agency on the 15th instant and convened council on the 16th instant, with, as above stated, 63 Indians in attendance, at which council I explained the said Senate and House bills with reference to opening the surplus lands of the Cheyenne River Reservation, as shown by the minutes of the council, transmitted herewith (Exhibit no. 2), and it will be seen from said minutes--page 17 to 24, inclusive--that the Indians realized it would be advisable for them to consent to the opening of a portion of their surplus lands with the hope of thereby securing a diminished reservation.

During the time our council was in session at the agency a council was also being held at the Cherry Creek substation, 90 miles southwest of the agency, and H.N. Crouse, farmer in charge of that station, phoned to me that afternoon (the 16th instant) that the Indians of the Cherry Creek district, then in council, had decided by a vote of 39 to 19--being 2 to 1--to relinquish a part of their reservation, and that 27 had voted to have the cession embrace the northern part of the reservation, and 20 voted to have the cession taken from the west and north in about equal quantities. The general sentiment of the Indians in council with me at the agency was in favor of the relinquishment of a tract on the west and a strip along the north of their reservation, which was in line with the expressed views of the Standing Rock Indians.

The Cheyenne River Indians also desired annual payments from the proceeds of their sale of the relinquished lands instead of having the

money deposited in the United States Treasury to draw interest at 3 per cent per annum for a period of ten years, as provided in said bills, and also demanded $2.50 per acre for sections 16 and 36 of each township of the cession reserved for the use of the common schools in the State of South Dakota, in view of which demand I assured them that I would make a similar recommendation in this respect as promised to the Standing Rock Indians.

Just previous to the close of the Cheyenne River council James Crowfeather, president of the Indian council, requested that I defer submitting my report of the Cheyenne River Reservation for a few days in order that the Indians of the entire reservation might be enabled to assemble at some point for conference regarding the matter, and that they would forward me a paper reporting the result of such conference, which would reach me at Washington on or before Saturday, the 28th instant, but up to the present time I have not

received the same, and have therefore concluded to submit my report as herein set forth.

In conclusion, I desire to state, as my belief, that the opening to settlement of the tracts of the respective reservations, as herein suggested, will result beneficially to the Indians and be acquiesced in by them, and I therefore respectfully recommend the opening of the lands in the said reservation lying west of the line dividing ranges 23 and 24, in South Dakota, and ranges 84 and 85 in North Dakota, together with townships 16, 17, and 18, ranges 24, 25, 26, 27, 28, 29, 30, and 31, in South Dakota, as indicated in blue pencil on the inclosed map.

Very respectfully, your obedient servant,

James McLaughlin,
United States Indian Inspector
The Secretary of the Interior.

EXHIBIT No. 1.

Proceedings of a council held at the Standing Rock Agency, Fort Yates, N. Dak., by James

McLaughlin, U.S. Indian Inspector, with the Indians of the Standing Rock Reservation, in the States of North and South Dakota, for the purpose of obtaining an expression of the views of said Indians with reference to the opening of their surplus lands to settlement as contemplated by Senate bill 1385 and House bill 17825, Sixtieth Congress, first session.

Council convened on Monday, March 9, 1908, at 1 o'clock p.m., with Indian Agent Belden, Agency Clerk Randolph, and 130 male adult Indians, leading men of the reservation, in attendance, with Antoine De Rockbrain, Charles McLaughlin, and Robert High Eagle, interpreters.

Indian AGENT BELDEN. Friends, will you please come to order. We have with us to-day Colonel McLaughlin who needs no introduction to you, he is here as a representative of the honorable Secretary of the Interior and will present to you a matter of very vital importance to each and every one of you. The Secretary has asked

the Congressional committee as a special favor that they put this to you, that you may understand and have some voice in the action that will be taken. Colonel McLaughlin will now state to you his object in meeting you and I hope you will give the matter your undivided attention.

INSPECTOR MCLAUGHLIN. My friends, I am glad to see such a representative gathering of the leading men of the reservation, and am pleased to meet you. I know that the heavy roads and long distances many of you have traveled in reaching here has been something of a hardship, but the matter which I have to submit and explain to you is one in which every person of this reservation is interested, and I am much pleased to have so many of you present.

You have been assembled here to-day to meet me in council, and as I am well known to all of you I shall proceed at once to state the object of my visit to your agency at this time.

I have been sent here by the Secretary of the Interior to explain to you certain pending legislation which contemplates the opening of the surplus lands of your reservation to settlement after allotments shall have been made to all persons entitled thereto.

There was a bill introduced in the U.S. Senate by Senator Gamble, of South Dakota, on December 9 last, about three months ago, providing for the opening of that part of your reservation embraced in Schnaase County, South Dakota, and another bill introduced in the House of Representatives by Congressman Marshall, of North Dakota, on February 22 last, only sixteen (16) days ago, the Marshall bill providing for the opening to settlement of all surplus lands in the Standing Rock Reservation. The words "surplus lands" referred to in these bills means all lands of your reservation remaining after allotments have been completed to the Indians entitle thereto.

I have copies of the two said bills here with me which I will read and explain to you presently, but before doing so I wish to advise you regarding a certain decision of the United States Supreme Court, which has a direct bearing on the questions involved in the proposed legislation.

In considering the question which I will submit you must bear in mind that the law vests in Congress the right to open Indian reservations to settlement without obtaining the consent of the occupants or without even consulting them regarding same. This was fully determined by a decision of the Supreme Court of the United States in which is known as the Lone Wolf case in a decision handed down by that court on January 5, 1903, five years ago last January.

Lone Wolf, who is a Kiowa Indian, of Oklahoma, whom I know very well, objected to certain Congressional legislation affecting the lands of the Kiowa and Comanche reservation, and, acting for himself and certain of his people,

brought suit against the Government to prevent the opening of their reservation. The case was ultimately carried to the Supreme Court, which is the court of last resort, there being no appeal from its decision, and the decision that court was in substance that Indians are wards of the Government; that the Government is guardian of the Indians; that a guardian has the right to do that which he deems best for the ward, therefore, that Congress has the right to open Indian reservations by legislation without obtaining consent of the Indians occupying it or without consulting them relative thereto.

This is the situation, my friends, as to the power of Congress to open the surplus lands of Indian reservations, but it is the desire of the Secretary of the Interior and Commissioner of Indian Affairs that Indians be consulted and their views ascertained before legislation for the opening of any of their surplus lands is enacted, and

that is why I am now here to confer with you relative to this proposed legislation. I am not submitting this question to you of my own volition, but have been sent here by the Secretary of the Interior and directed by him to be governed in the premises by instructions prepared in the Office of Indian Affairs.

I will now proceed to read and explain these two bills referred to.

(Inspector McLaughlin here reads and explains Senate bill 1385 and House bill 17825, Sixtieth Congress, first session, which consumed one and one-half hours.)

INSPECTOR MCLAUGHLIN. I have now read and explained the two bills affecting your reservation and the question is before you for consideration, and I desire an expression of your views regarding them.

You need have no hesitancy in speaking your minds freely to me regarding this matter. I

am here not only as the representative of the Government in this conference, but also as your friend, and I shall endeavor to make every phase of the question so clear to you that you can not fail to understand it.

I have been sent here to ascertain your views regarding the legislation which is now pending before Congress, but which will not be further acted upon until my report from this reservation has reached the Department. You should consider the several provisions of these two bills, in a business-like manner, and meet the wishes of Congress commendably by determining upon how much of your reservation you are willing to relinquish, also, as to the method of its disposal and manner of payment, but the conditions of its sale and manner of payment must be in accordance with the general provisions of the said bills.

While Congress has the power under the law to open all of your surplus lands, should you

meet the situation reasonably with some proposition that would be favored by the Secretary of the Interior and Commissioner of Indian Affairs, something that would justify their submitting it to Congress with their recommendation that it be adopted as a modification of these two bills incorporated in one bill, I am reasonably certain that it would be acceptable to Congress, and a diminished reservation might thus be secured to you.

My friends, as I have before stated, I am not here of my own volition, but sent here by my superiors to present this matter to you and explain it clearly, so that you may understand what is contemplated by these bills which have been introduced in Congress and which are liable to become a law during the present session of that body unless you meet the question with some reasonable proposition that may meet with Departmental approval and be acceptable to Congress.

I know how dear reservations are held by the respective Indian tribes occupying them and

how they wish to hold them intact. This is but natural, and were it in my power to have them undisturbed as they now exist I would cheerfully cooperate in having them remain so, did I deem it best for the Indians; but that is impossible, my friends. Large reservations were possible in the past, when there was what was called a frontier. That was when the greater portion of the population of this country lived east of the Mississippi River; but the immense immigration coming to the United States from European countries forced home seekers to press westward from the east, and later pressing eastward from the west resulted in the obliteration of the so-called frontier.

There is no more frontier where settlers may find homes readily, and the steadily increasing population demands additional land as homes for incoming settlers. The demand for land by home seekers is now so great that Congressmen are being constantly urged by their constituents to

open more lands to settlement, and the sentiment in Congress to open the surplus lands of Indian reservations has been growing stronger each succeeding year for several years past, until now the sentiment prevails that Indians may only retain what land they actually need and can make proper use of.

Anticipating what is likely to be brought about in this respect, the Secretary of the Interior and Commissioner of Indian Affairs are exceedingly desirous in protecting the Indians and to obtain for them the best terms possible for their surplus lands in the legislation enacted by Congress for their opening.

In the past I favored Indian reservations being held intact, but from observation I have changed my mind as to that and now believe that it will be manifestly better for the Indians to have their surplus lands opened, as it brings in white settlers among them, from whom the Indians

may more readily acquire the white man's civilization and industrious habits, and it also provides a better market for the products raised by the Indians.

To meet this question you must prepare for it by consenting to some compromise between these two bills, such as may be accepted as a modification of the more drastic measure contemplated by the Marshall bill, which would open all of the surplus lands of your reservation after allotments were completed.

You have a very large reservation, certainly much greater than you need and much greater than you will be privileged to hold, and I now wish to hear from you regarding the matter which I have so carefully explained.

Should you wish to confer among yourselves before discussing the matter with me, we will adjourn for a time that you may consider the proposition among yourselves and I leave this for you to decide. I am here for this purpose, and

for this purpose only, and you are privileged to express yourselves now regarding the matter or adjourn for a time.

I have explained the proposition very thoroughly, and you are doubtless ready to express yourselves as to what changes, if any, you would wish made in any provision of the bills which I have read.

I desire to meet your wishes, and although my time here is limited I will not hurry you, and it is for you to decide as to whether we shall take a recess now or you proceed to express your views on the question submitted.

JOHN GRASS. The inspector has told us some things which are very clear to us. On that account we will hold a council this evening and will consider these two propositions. To make all clear, we will consider it. By doing so we will be able to give more thoughtful answers to the propositions, which we will give to-morrow. I am

pleased with what the inspector has said, and I think that everything that he has told us is satisfactory to everybody.

INSPECTOR MCLAUGHLIN. I am very much pleased with John Grass's remarks, and think it a wise conclusion. I am not here to urge you to do that which is displeasing to you nor to influence you to do other than what I fully believe to be for your best interests. If I can give you any advice or information, I am here for that purpose, and don't hesitate to call upon me at any time up until midnight, and I will come to your council and answer any questions you may wish to have made clear. I will leave you the two bills which I have read, also some documents, which may be of assistance in your deliberations. Every word that we have said here to-day will be typewritten to-night, so that you can have a copy before our council to-morrow. I will say for your information that it will be useless to confine yourselves to the Gamble bill, because it will not

meet the wishes of Congress, as I have a letter here from Senator Gamble himself with reference to it. I also met Senator Hansbrough in St. Paul and they, both of said Senators, now want a larger tract of land than is provided for in the Gamble bill. There is also a letter of Senator Gamble's attached to my letter of instructions, which I will also give to you in considering this matter. In discussing the matter among yourselves, I would suggest, and in fact urge, that you determine upon something midway between the Gamble bill and the Marshall bill--that is a compromise between the two, and, as stated to you in my first talk, I feel certain that a proposition of that kind will meet the approval of the officials of the Department and be accepted by Congress.

BEARFACE. I would like to say something here, and that is that our horses are starving and also the Indians, and we want to know what the agent has to say about it.

AGENT BELDEN. I will furnish some hay for the horses and rations for those in attendance at the council to-night.

INSPECTOR MCLAUGHLIN. It is now 4 o'clock and the council is adjourned to meet at 8 o'clock to-morrow morning.

At the request of the Indians the council was not convened until 3:45 p.m., March 10.

Inspector McLaughlin called the council to order.

The council is now convened for the business for which it was assembled, and I am ready to hear what you have to say in regard to the question submitted to you yesterday.

ARTHUR TIBBETS. I am one of the number who has been honored with the appointment of speaking before you. You have been with us in the past and if anyone has been connected with the elevation of these Indians toward civilization, it is you. You have guided us in the footsteps of civilization by starting at the bottom of the

ladder and working up, and we are well pleased with it. You have been instructed by the Department, the Commissioner, and the Secretary, to come before us with this proposition.

We are very much pleased that you have come to us and honored us with the privilege of talking this matter over and giving us a chance to use our voice. We are very much pleased with the action you have taken and it is beyond words to express our thanks to you for what you have done. You explained the two bills yesterday and gave us our choice as to one or the other of them, or between the two as a proposition. We have carefully weighed the two propositions that you laid before us. We have weighed carefully all your statements and your talk even to the very smallest word. We have considered the matter as affecting us and our children in the future. I want to tell you the first proposition that we want to make. In considering the two bills you have put before us, we give you now our opinion and

what we would like. The bill of Senator Gamble seems to call for one county in South Dakota of the Standing Rock Reservation. Congressman Marshall's bill calls for all the vacant land on the Standing Rock Reservation in North and South Dakota.

We have decided here in council to draw a line showing the land we are willing to cede. We have decided to give up 29 townships. That is what was considered and finished last night.

Since that time our agent has brought a map here and showed us an addition to that. It was our intention to comply to some extent in regard to both these bills. It seems that you desire a great deal more land than we have already decided we want to give up, and the reasons for that I will state.

In the first place, the reason why we should not comply with the full request is this. The land seems to be very valuable. Even though a

person would own one foot of land, they would value it to a considerable extent. The land which we own on the Standing Rock Reservation is very good and fertile land. It is true that it is good land, because the railroad companies are now planning to build two or three roads through the reservation; one road is now completed and running through. The reason we feel we should not spare all the land the bill calls for is because if we keep our land for a little while longer we will realize much more for it than if we sell it at the present time. This is what we have decided and we hope that you will comply with what we have decided is for our best interests. What I wish to impress upon your mind is that we are willing to spare the 29 townships in North and South Dakota in the western part of our reservation.

The second proposition is this: It is the usual thing that when land is opened for settlement sections 16 and 36 are reserved. We understand from the price, and what has been

said before, that the price is rather low. We understand that it is $1.25 an acre. As I have already stated, the land is more valuable now than in the past, and we think $1.25 an acre is too small a price, and we now ask $2.50 an acre for the school land to be set aside for the State.

These are the conclusions of the council which we are now demanding of you.

The third and last point is what I wish to speak of now. At the time you were agent here it appears that the President or the Commissioner set a price on the land and that it would be sold at the price set. Since that time they have laid aside some land for us as allotments. This council demands that only those Indians really belonging to the reservation and living within the reservation should receive allotments. We have looked the matter over carefully and have decided on this point, and we would demand to receive $10 per acre for the land in the tract we have

consented to relinquish. I have already stated the reasons why we should demand $10 per acre for it.

THOMAS FROSTED. We have gathered together here for the purpose of counciling with you. Inspector McLaughlin, and also our agent. It appears that Congress has decided upon things which they think would be for our best interests, and we have considered the matter and wish to state what we think would be best for ourselves. Going back to the time when you were agent, we were a powerful nation, but have been gradually reduced in numbers since that time. At that time we were asked to relinquish some of our land, stating that it would be for our best interest to do so. As we have thought of the bargains we made in the past and of the question before us now, we are considering whether it is for our own good or not to accept the proposition now laid beofre us. At the time of our agreement of

1889 it was decided that $3,200,000 should be placed to our credit and we should receive the interest thereon in per capita payments, and we have never received any particular benefit from it. Since that time a great many have died and passed away without receiving any particular benefit from it. We were told at that time that at the expiration of 25 years we would receive the full benefit of $3,000,000. That may be true, but many are now dead and gone. I wonder if they will resurrect the dead and pay them. In consideration of what has been done and what is about to be done we have decided at this time that we should relinquish 29 townships, and if we are going to receive any benefits from the sale of this land, we want it in a way that it will be of some benefit to us. We don't want to put the money from the sale of this tract at interest and draw per capita payments; that is not our intention. We have learned that white people are very happy

when they have money in their pockets and are jingling it, and we feel the same way and we want the same thing. We want to receive the money as it is paid into the Treasury every year. As we have now had some experience and know what money is, we believe we can make good use of it if it is paid to us and not put out on interest.

The second proposition is as follows: We are just at that stage where we know a little more than we did in the past. There are probably 10 men on this reservation, including mixed bloods, who are pretty well posted on this proposition. We understand you to say that three people would be chosen to appraise the land, and that there would be three commissioners, one of whom to be from this reservation, and we have decided that a resident member of this reservation shall be chosen as a member of this committee. We don't refer to a white man married to an Indian woman, but desire a resident of the reservation--a member of the tribe.

And we have also decided that at the time this appraising is to be put in force we would like to choose this member ourselves. The reason for this is because we will choose someone acquainted with the reservation, who has seen the good places and bad places of the reservation.

The third proposition is: The benefits from the sales of land as a usual thing in the past have gone to some people who are not entitled to it, and it is our intention to make a little change in this, in this agreement to relinquish the land that we are here for. We realize that at the time of the previous sale of this land, for which we received $3,000,000, there seemed to be six reservations included in the proposition, and since that time we have suffered considerably by reason of a number of Indians who were entitled to rights here. Our land is now simmered down to a very small portion and we have not much to spare, but the benefits of what we are now going

to spare should be paid to the members of this reservation and living within the reservation. We thought we knew what we were doing at the time, but the Santees were regular rats and they worked their game slick. From this on we have decided that those people have no rights on the reservation and not entitled to any benefits. There are some people who claim rights on the reservation that we have never heard or seen. We refer to the Harmons and the Kemptons. We don't know who these people are, but whenever there is a per capita payment money is always sent to them. It is our intention to discontinue the claim of those people, as they have no rights on the reservation. The residents of the reservation are the people who live here and who have the intention of dying here; those are the people who should get the benefits from the sale of the land that we wish to relinquish. Those are the three propositions I wished to speak of.

ANTOINE DEROCKBRAIN. Inspector, I have a few words I wish to say to you in regard to the council we held last night and to-day. You placed two bills before us for our consideration and asked us what we thought of the two bills presented to us. Senator Gamble's and Congressman Marshall's bills I refer to. In considering the two bills we have decided to take parts of both bills. That is what I am going to speak of. We have decided that we would relinquish 29 townships. There are about five townships in North Dakota and the balance in South Dakota. We have drawn a red line on the map, the land within which we propose to relinquish. It is between ranges 21 and 22 in South Dakota and between ranges 86 and 87 in North Dakota. In considering the two bills you brought before us we have decided to relinquish the 29 townships already referred to and the balance of the reservation left to us we desire to hold in common for our own benefit for the purpose of grazing land

to run cattle and horses on. It seems that all we have to look forward to for our future benefits is the stock industry, and it is possible that we should have a little spare grazing land to support them, and the land allotted to us is not sufficient to maintain the number of stock we have, and we should have a little surplus land which our stock can feed upon. As this is not an agricultural country we will have to resort to stock raising for our living and should have more land than the allowance allotted to us.

In regard to the proposition of Congressman Marshall, that we throw open all the surplus land, we are unable to comply with it. With the stock we have at present, and what we are going to receive the coming season, and the prospects of our children in the future--and as we understand the wives of Indians are going to receive additional allotments of land, we will not have any too much spare land, and therefore the surplus land that we are going to hold aside from what we

now propose to relinquish is not any more than enough for the Indians of the Standing Rock Reservation. It is hard for us to relinquish any more, and we desire that the unoccupied land that we are going to hold that we will be permitted to hold it in common for at least 10 years more and that Congress and the Commissioner will support us in this wish. That is the understanding of the council here assembled, that we are to relinquish the 29 townships already mentioned, and not any more, owing to the facts I have already mentioned. With regard to the proposition that sections 16 and 36 be set aside for school purposes, we should receive $2.50 an acre for same. We understand that these school lands will be for the benefit of the Indians as well as the whites in the future, as some of the Indian children may attend them, but at the same time $1.25 an acre seems a very small price, and we would therefore ask you to allow us the $2.50 per

acre for it. The Flandreau Sioux and also the Kemptons and Harmons are not to be included in the benefits of this sale that we are now talking about; that is what we have also concluded. No one except those who are actual members of this reservation should be entitled to any of the benefits of the sales of this land. We also request the privilege of choosing one of the committeemen to appraise the land, and we should have the right of choosing as such member one who is an actual resident of the reservation.

JOHN GRASS. Well, Inspector, whenever you come here you are apparently one of our number, and whenever we see you it makes us very glad. We know the reason you come, and we know you come to take a piece of our land away, and sometimes it worries us a great deal. I am one of the number chosen to lay before you what the council has decided last night, but these young men who can read and write have apparently laid everything before you. The amount of

land that we have left, after relinquishing that now agreed upon, we don't want to disturb any more; we want to leave that, and we don't want to hear you say that what we have agreed upon is not enough. You may think that as we are willing to relinquish a certain piece of ground that it seemed so easy to you that you would come after us for a little more, but in this particular instance don't ask for any more; we have given you all we can spare. We have reserved a little unoccupied land, but the reason for that is because we are growing in wealth and stock, and the prospects are that some more land is going to be given to the wives of Indians; thus we would want more land, and also taking into consideration the prospects of our children in the future, we can not spare any more, and we want this to be left to us at least for some time. The small portion of unoccupied land now left to us is, we think, no more than we can be benefited by.

Now, we have thought the matter over and have given up all the land we can possibly spare, but it seems you white people claim to know what is best for us, and you go a little further. The Department has chosen for us the stock industry, and they have given us a great deal of stock, which we can show upon the reservation at the present time,and they do this because they want us to advance. They do not want us to go back and be poor, and the land we will have left is no more than we will need for the stock we have now, and we don't think it the right thing to take away any more land and tell us it is for our best interests.

It is the usual thing with the white people, when they make laws to make laws for their own benefit, but these laws are sometimes changed according to the growth of the country or benefits of the people. We know that $1.25 per acre is what is supposed to be paid for the school sections. We want to do like the white people

and make a little change from $1.25 per acre to $2.50 per acre for the school sections, as we understand that white people make changes according to their own benefits and we wish to do the same. In the past the people who have realized the most from the interest money have been the employees called farmers. We have had a great many additional farmers and it appears that the money was spent for that purpose, and I wonder if the interest on this money will be used the same again. And for the reason already mentioned we prefer that the money paid for these surplus lands be paid to the Indians directly each year as it is paid into the Treasury and not put out at interest. There are people living off the reservation and unknown to us, who simply write in here and tell the agent that there is a child born to them and on every payment they send money out to them. We don't

know anything about these people, and we have decided that they must not participate hereafter. I could refer to one instance here--Louis Primeau's daughter. She has reported a birth in her family, and without seeing the child the money was sent to her. In connection with the land we are going to relinquish, I wish to ask a question in regard to the manner in which the coal lands are going to be appraised. We understood you to say that was not to be bought; is that right? (Explained by Inspector McLaughlin.)

It is certainly a fact that the Department depends a great deal on you; you are sent here for all big purposes, and now we are also depending on you a great deal. We have laid our proposition before you and want you to work for us the same as you do for the Department. If our agent is going to make a trip to Washington, we have a great deal to say to him before he goes--we depend a great deal upon him. We forgot to mention that, and that is why I got up

again. Our agent has always done a great deal for us, and if he goes there we look forward that he will help us a great deal.

INSPECTOR MCLAUGHLIN. I am very glad to hear you express yourselves in regard to the business propositions which I submitted to you yesterday, and I am very much pleased with the way you have expressed yourselves regarding the questions. Knowing how dear your reservation lands are to you, and as I also said, if it were in my power to leave your reservation undisturbed I would gladly do so, provided I thought it for your best interests, but, as I explained in my talk yesterday, it is impossible for you to retain such a large tract of land, which is regarded as a barrier to the development of the country.

I will take up the questions in the order in which you have mentioned them. As for the 10 dollars an acre which you demand for the land, I

wish you to understand the question fully and clearly--that Congress will not consider any lump-sum consideration based on a stipulated price per acre on Indian reservation lands in the future, nor will they guarantee to sell your lands only as applied for; that is, they do not guarantee to find purchasers for the land, but simply sell the land, collect the money, and pay it out to you as the bill provides. Congress will not appropriate any money to be used in advanced payments for any lands which had formerly been part of an Indian reservation or any other reservation. Up until about six years ago that was the practice. Commissioners were sent out to negotiate with the Indians, and they would agree to pay a lump-sum consideration, and Congress would make an appropriation to meet the requirements, but they have now adopted a plan which is very fair for the Indians. All reservation lands that are being opened are appraised by a commission appointed for that purpose, and the

lands sold to the actual settler at the appraised valuation.

In the past all lands, regardless of the class of lands or their valuation, went at the same price. Now they are classified, and the better quality of lands bring the higher price, and they are not appraised in 160-acre tracts but in 40-acre tracts--that is the smallest legal subdivision. There may be one poor 40 in a 260-acre tract, which, in case it was appraised in 160-acre tracts, would lessen the value of the quarter, but by appraising it in 40-acre tracts you get the full value of your land; and that such classification and appraisement may be fair and just to the Indians the commissioners appointed for that purpose are selected, one from the Department at Washington who is entirely disinterested, one to be a citizen of the State in which the land is situated, and the third a member of the tribe whose lands are involved. On your reservation

you have a number of young men whom I would regard as fully competent to hold that position. Therefore you need have no fear, or feel at all uneasy about not getting a fair value for your land under the system provided in the bill. The lines you have drawn, my friends, that is the line dividing ranges 21 and 22, takes in a tier of four townships and a little fraction along with the western boundary, and whilst I admit that it is a very nice concession for you people to fix upon yourselves, I am at the same time fully convinced that it would not meet the wishes of Congress. Your speeches and the contentions offered will appear in the record. The Secretary, the Commissioner, and Congress will see exactly what you have said regarding it.

Now, my friends, as to the lines which I have marked on this map in blue pencil for you to relinquish, if every Indian on this reservation were to receive an allotment within the diminished reservation it would still leave you about 500,000

acres of surplus land, and as there are a great many of your people allotted in the tract that will be ceded, you will therefore have a great many acres of surplus land within your diminished reservation.

The Marshall bill gives you permission to select any lands you may wish in the portion to be ceded, or those who are allotted there may relinquish if they do so desire and come within the diminished reservation. This matter is for yourselves to determine, and you will have at least a year and a half or two years before the reservation will be opened.

Nothing towards the opening of your reservation can be done until allotments to you who are entitled thereto have been completed. Then after the allotments have been completed the commissioners commence the classification and appraisement of the land. The report of the commission has to be sent to the Department,

examined, and approved before any proclamation would be issued for the opening of the lands, and I am therefore quite confident that it would be approximately two years before your reservation would be opened.

You must bear in mind that the diminished reservation, which will be yours to retain, enables all children born to receive allotments so long as you have any surplus lands in your diminished reservation. My friend Thomas Frosted said that after conceding these 29 townships on the west you did not want to be disturbed nor asked for any portion of your diminshed reservation for at least ten years.

In order to meet that desire of yours, the best thing for you to do is to accept the lines which I have indicated in blue pencil on this map. The.e are two reasons why I wish you to accept this.

The first is that in case you retain the two tiers of townships west of the blue line which I

have drawn the white man will say "the Standing Rock Indians have too much land" and would not be satisfied with the amount you have given up at this time, and another effort would soon be made to get more ot it.

The second reason is that I do not believe that Congress would be satisfied with anything less than what is indicated there, and by your people consenting to it it would give the Secretary and the Commissioner something reasonable to go before the committee and advocate its adoption, and you would all feel better yourselves by having been a party to the concession than to have the land taken away from you regardless of your wishes, and I would therefore like to have you concur on that line.

In regard to paying the money to you from year to year instead of having it remain there for ten years as provided for in the bill, I believe that your reasons are well founded, for the

reason that you are now deriving considerable revenue from your pasture leases, which will be discontinued as soon as the reservation is opened, and you will need a reasonable amount of the proceeds from the sale of your lands annually to provide for your family needs. Your agent has spoken to me about the matter and I have prepared a memorandum to meet that question, I think, and shall recommend it strongly in my report and hope to have it incorporated in any legislation that may be enacted in the premises.

The proviso is as follows:

"That the proceeds derived from the sale of said lands shall be expended for the benefit of the Standing Rock Indians, in the discretion of the Secretary of the Interior, upon an application to the Department annually by a majority petition of the said Indians, through the Indian agent in charge of the Standing Rock Reservation and upon his recommendation."

And in order to meet your wishes in regard to the double minimum price for your school lands--that is, $2.50 per acre instead of $1.25--I will recommend the following:

"That sections 16 and 36 of the lands in each township of the tract relinquished shall not be subject to entry, but shall be reserved for the use of the common schools of the States of North and South Dakota, respectively, for the State in which the lands relinquished are situated, and paid for by the United States at two dollars and fifty cents per acre, and in case any of said sections or parts thereof of the land in the tract relinquished are lost to the States aforesaid by reason of the allotment thereof to Indians or otherwise, the governors of the said respective States, with the approval of the Secretary of the Interior, may locate other lands of similar character and equal value not occupied and not exceeding two sections in any one township, which shall be paid for by the United States as

herein provided, in quantity equal to the loss, and such sections shall be made prior to the opening of such lands to settlement.

I wish to call your attention to another matter which I have been directed to advise all Indians of when negotiating with them for lands which will bring annual cash payments to them.

It is with reference to the shares of minors derived from the proceeds of cession of tribal lands. The rule obtained until about three years ago that when payments of cash annuities were made to Indians the parents of the minors received the share of their minor children, but during the past three years in all payments of that kind the shares of minors are deposited in the U.S. Treasury and retained there until the minor reaches the age of 18 years, at which time the money thus deposited is paid to them. While this money belonging to minors is in the Treasury it draws three per cent interest, which interest may be paid annually to the parent or person having charge of the minor.

Every State in the Union has a law requiring the money belonging to a minor to be cared for until the child becomes of legal age, which is 21 years in most States, while the Indian Office has fixed the age at which the Indian children attain their majority for this purpose at 18 years. In this way the minor child's money is not squandered, so that he or she may have something to begin a business career with when they reach manhood or womanhood. This system is wise and benevolent, and the Commissioner of Indian Affairs has adopted a plan by which the parents or guardians may receive the minor's share at all regular per capita cash payments. His plan is to ascertain by careful inquiry if the parent or guardian is capable of conducting their own business affairs wisely, and when satisfied as to their sobriety and competency he has their names placed on what he calls a "roll of honor," which

entitles these roll-of-honor members to all privileges which would be enjoyed by a white man of good reputation and business ability.

You will understand from this that each and all of you have the opportunity to have yourselves placed on this roll of honor and thus be privileged to handle the money of your minor children or minor wards.

The roll of honor at Rosebud Agency now contains the names of nearly one hundred families who are enjoying the privileges of white citizens of the community.

I want you to come up here to look at the map, so that you may consider the question further and give me your answer after supper. What you have said, my friends, appears in the minutes of the council and will go forward with my report. I feel very confident that Congress will not accept the 29 townships. The tract of your reservation desired would run along the line

dividing ranges 23 and 24 from the southern boundary of your reservation through to the line dividing the States of North and South Dakota, thence west along the boundary line to a line dividing range 84 and 85, through to the Cannonball River, North Dakota, which is the northern boundary of your reservation, and also townships 18, in ranges 24, 25, 26, 27, 28, 29, and 80, this latter being conditioned upon taking two tiers of townships from the Cheyenne River Reservation.

Should Congress be satisfied with one township following the cattle trail through the Cheyenne River Reservation, the Standing Rock Indians then would not relinquish this row of townships along the southern boundary of the reservation. I wish you to consider this until 8 o'clock tonight, and I will then want your answer. Repeating to you again this evening what I said yesterday, I am not only here as a representative of the Government but also as your

friend, and anything I can do to protect your interests I will gladly do, and I promise to do what I can to hold the southern cession to one township in width, and if they will accept one tier of townships on the south, and that lying west of the blue line between ranges 23 and 24, I will have accomplished a great deal more than I thought I could when I started out in this work, and I will promise you that, in case they do not take but one tier of townships in the Cheyenne River Reservation, which will be the cattle trail, I will make a strong effort to prevent anything being taken along the southern part of your reservation east of range 23. But, in case they take two tiers of townships from the Cheyenne River Agency you will have to relinquish one tier of townships in the south; but that will depend upon the opening of two tiers of townships on the norther portion of the Cheyenne River Reservation. By your conceding range 23, it would incline Congress to accept the old cattle trail of

six miles width as a sufficient outlet for a railroad through to the west and also separate the two reservations, which is desirable.

The reason I am speaking to you with such confidence as to being able to hold the suggested diminished reservation is because I feel that I will have the Secretary and the Commissioner with me in the matter when I submit my report, providing this blue line is adopted. It would be so much better for you to concur in this inner line than to have it taken from you anyway, which I feel quite sure Congress will do, and it will be a great satisfaction to you to be a party to the agreement instead of having it taken from you. It is only a matter of two rows of townships more than you propose and it leaves you ample surplus lands for all the stock you will ever possess.

There is another thing I want you to understand. So long as you have leased pastures, the general sentiment throughout the country will be

that you have lands to spare--more than you need--but when you have no more than you need you are not likely to be further troubled, even should some of your grass be going to waste.

As figured by your agent to-day the interest on the proceeds of this cession would be double the lease money you are now receiving.

You may not wish to recede from the decision you have made, and I would suggest that you leave it to the discretion of the Secretary and the Commissioner of Indian Affairs to determine the question. If they feel that they can satisfy Congress with the line you suggest, well and good, but in case they find it necessary and believe it to your best interest to adopt this bue line, leave it to them.

In talking to you I feel that I am talking to my own family, and I state as my judgment that this blue line is the line that should be adopted for your best interest and protection, because by it you will have a diminished reservation that will

in all probability remain undisturbed for many years to come, while if you refuse to give up these two additional tiers of townships it will only be a year or so before you will be forced to dispose of more.

Where this suggested line strikes the Cannonball is about as far above the Porcupine station as it is from here to Battle Creek, just about 8 miles, and it is 6 miles in a direct line, as the crow flies, west of the Bullhead station, which is about as far as from here to where the telegraph line used to cross the Missouri River south of here, down at the point below where Mrs McCarthy used to live, that is about 6 miles, and you will have all the country east of that line clear through to your southern boundary and north along the same line through to the Cannonball River, to a point fully 8 miles west of the Porcupine station.

The question before you is, Are you willing to leave this matter with the Secretary of the Interior and Commissioner of Indian Affairs to determine and do the best they can for you, or do you still adhere to your former decision?

This is what I wish you to decide upon. I would like to have a vote on this question after you have considered it. I have said all that I deem necessary.

THOMAS FROSTED. I would like to say something. There is something mentioned in one of these former treaties, in the 12th article of the agreement of 1889. [Reads the article.] According to what I have just read, some points could be made bearing on this subject, and quite readily, but since this matter had been decided upon last night we don't feel that we are in any shape to pass upon this subject.

It makes no difference how wise we are or how wise our statements would be, the Members of Congress know what they are about, and on

that account much cowardice has been displayed by us. There is great danger in the way we have agreed to relinquish a portion of our reservation, which differs from the way Congress desires and now, while we have the opportunity, let us try to meet the two propositions halfway. The decision will be with Congress anyhow, and while we have a chance it would be a good thing for us to consider some way in which we may compromise the two bills.

It would be worth while for us to come to some satisfactory agreement whereby we can save a larger portion of our reservation, and in doing this we must try and consider what is desired by Congress.

Last night this question was discussed here, but a good many of us were absent, and when the matter was taken up again in the council to-day there was hardly enough time to discuss it to make it clear to everybody. We did not fully

understand what it meant, but I say now that we should accept the lines desired by the Government.

Of course, we have made our agreement and it is quite natural that we should want to try and hang onto it, but then it would not do for us to go away without considering the great danger and risk we are running, when a saving of a large portion of the reservation should have due consideration, and for which neglect we might afterwards be sorry. We, the young men, often blame the chiefs and headmen who made the former treaties because there are certain parts which we think are injurious to us. Now, if we are to overlook any kind of a serious proposition in this agreement before us, and should afterwards discover that we had left out something that we should have considered carefully, we would be doing the same thing that we have blamed others for--that is, not considering the proposition when it was in progress.

If we were to take one step toward the line proposed by the Congressional committee we would be better satisfied and not sorry for the step we had thus taken. In compromising the two bills that have been laid before us we would feel that we were on a solid basis so as to save a larger portion of our reservation. This is my opinion; of course, you people have your views on the matter.

Inspector McLaughlin reads and explains a portion of the decision in the Lone Wolf case.

INSPECTOR MCLAUGHLIN. There has been a sentiment growing in Congress for serval years past to open all surplus lands to settlement, and it is now the sentiment prevailing in Congress. It is the general belief that Indians should not have any more land than they can make proper use of. And it is that sentiment which is apparent to Commissioner Leupp at the present time and is causing him a great deal of worry.

He has to work constantly to protect the Indians, fearing that Congress will step in and take the surplus lands of reservations and give the Indians nothing for it. Commissioner Leupp's heart is in his work and he has a sincere feeling for the Indian, and to make it possible for him to protect the Indians' interest to the very utmost the Indians must co-operate with him so that he will have something reasonable to go before Congress with, and say "I demand this as a right for these people," and he will then be able to get a sufficient number of Congressmen to aid him.

At the Flathead and Blackfeet agencies the Indians have been alloted and their surplus lands are now being appraised and as soon as the appraisement is completed these reservations will be opened, and that has been done without the consent of the Indians. That is why I am very much pleased with the speech of Thomas Frosted, and with the view he takes in his closing remarks, and I hope you will all come to see this question as he does.

If this bill was depriving you of lands that you really needed it would be a different question, but it will leave you as large a reservation as you will need for your stock and give you allotments for all your children who are born for several years to come, and I feel as confident as that I am standing here, that by going before the committees of Congress with the recommendation and support of the Secretary of the Interior and the Commissioner of Indian Affairs it will be accepted and leave you your diminished reservation intact.

ANTOINE DEROCKBRAIN. The inspector is listening to our reconsideration of the proposition laid before us, and I have listened to what the inspector has said. The inspector brought some bills here, and we have considered them to see if we could not agree upon some portion of land that

we could spare, and we have agreed to that already; we have concluded that we could spare 29 townships, and the Indians have considered this very carefully, and the Indians have decided upon it, and at present that is all they can spare.

I am one of the four men appointed by the Indians to give you our answer, and I consider it my duty to say nothing outside of what has been decided upon by the Indians in council. Unless the Indians at some future time come to some other agreement and fully decide and would appoint me as they did to-day, I would not for any reason at all change my ideas about it, but would stick to the decision of the Indians in council. I have been authorized and empowered by the Indians in council to announce their decision, and what I said has been recorded and I do not care to change it at all.

ARTHUR TIBBETTS. You spoke to us yesterday in a manner which is very satisfactory

to us. You presented for our consideration two bills; one of the bills contained a proposition for South Dakota lands and the other was by Congressman Marshall, of North Dakota, to throw open the entire reservation in both North and South Dakota. We have considered these two bills carefully and have taken action on them. You have requested us to consider the question of throwing open a part of our reservation. If we had known the lines drawn on the map there indicating how much land they wanted us to spare before we had decided upon the matter something might have been done towards concurring, but now as we have already told you how much land we wish to dispose of here in council to-day, it is hardly fair for us to withdraw from our statements taken down in writing. Therefore, all I can do at present, as one of the four speakers, is to stand just where the people placed me to interpret their expressions to you. Probably this

matter may come up again in the future and the people might have a chance to talk about it again. The people who voted on this question have most of them left for their homes, and it would not be fair for us to attempt to cancel the votes that this decision was based on.

INSPECTOR MCLAUGHLIN: Your talk and Antoine's has brought something to my mind that I want to explain to you, and show you the absurdity of your position, believing that your decision will not be satisfactory. As you see, Senator Gamble's bill is simply for Schnasse County and your concession does not embrace any land in South Dakota except what is included in the Gamble bill.

Schnasse County runs right up to the North Dakota line, and all you concede outside of Schnasse County is a little strip about five townships in North Dakota, while Senator Hansbrough, from what he said to me, will demand more than that for North Dakota.

I appealed to you very strongly in my talk to make a compromise between the Gamble bill and the Marshall bill. What you have made is a very small concession, because the Gamble bill embraces four tiers of townships in South Dakota, thus you concede five townships in North Dakota in addition thereto. All the concession you make in your so-called compromise between opening your entire reservation under the Marshall bill, or Schnasse County under the Gamble bill, is merely five townships, while the concession that I suggest would give something reasonable to go before Congress with, and enable the Secretary and the Commissioner to make a very strong appeal for you. I feel that I have done my full duty in presenting the matter to you very clearly, but I shall still do everything I can to prevent the line being fixed at any point east of that blue line dividing ranges 23 and 24. Your statements will show that you fixed upon a line

two townships farther west, but I am confident that it will not be accepted. I hope, however, that with your agent's assistance, we may be able to hold to the blue line, and not come any farther east. That is the line dividing ranges 23 and 24. I mention this so that you may prepare yourselves for it, and understand what in all probability will result.

I don't find any fault with the young men whom you selected to speak for your people, but I will suggest just one more proposition.

The minutes of the council will go forward with my report showing what you have been willing to concede, but should that not be acceptable I would wish you to leave the decision as to the line to the Commissioner of Indian Affairs, and your interests will be fully protected. He may be able to have the line you have decided upon accepted, but if he can not do any better I am confident that he will hold out for that blue line and not come east of range 23. I feel deeply

interested in this because I know the sentitment prevailing in North and South Dakota as well as in Congress relative to this, and there is danger that legislation may be enacted which will throw the line even east of what I suggest, but I am in hopes that it can be held on the line dividing ranges 23 and 24. This is all I have to say, my friends.

SIAKA. When the council was in session here to decide what answer should be given you I was not present, and I had in mind what to say in case I was here, but I could not be present, and therefore didn't have anything to say in regard to the decision made by the council, but now I will express myself as to what my personal opinion was at that time.

When I first heard of the bill introduced by Senator Gamble proposing to open Schnasse County, in South Dakota, I had a different opinion, but since I have heard of the bill of

Congressman Marshall, of North Dakota, for throwing open the entire reservation. I fear for the stock of the young people, not for myself personally, what would become of their stock industry. Therefore I thought it would be a good thing to relinquish the land mentioned by Senator Gamble's bill in South Dakota. Of course you have come to a decision here in council in regard to the matter. I think the inspector has given you very good advice on the subject. I believe it would be well to accept the lines he has suggested, as that would give strength to the Secretary to protect us in the future in legislation by Congress. I think if the line that was suggested by the inspector was adopted by the tribe now that it would strengthen the matter very much, and also strengthen the Secretary of the Interior and Commissioner of Indian Affairs, also the inspector and our agent, in helping us to retain the entire diminished reservation. This

was my opinion prior to the decision of the council here, and after I found out that the decision of the council was different from my opinion, and four speakers were chosen to announce the decision, I kept silent. Of course most of the people who were here to-day have gone, but there are a few here yet. They said they were going to gather again to-night, and I thought I would stay and express what I had in my mind personally.

I believe the boundary line suggested by the council will not hold, as the inspector has told us, but the one he has drawn on the map would be the proper one to adopt, and on account of the decision of the council we naturally expect that there will be another proposition before us in the very near future.

In regard to my speech here, I want it to be distinctly understood that I am not trying to tear down what the tribal council decided upon, but this is simply an expression of my private opinion, and I want the young men to remember that

they are likely to have another proposition before them again in the very near future. The boundary line fixed upon by the council here will not stand, and the one now drawn on the map will be brought before us again.

INSPECTOR MCLAUGHLIN. I want to say a few words in reply to Charging Eagle. He has certainly given the matter some thought for the reason that he has discussed it very intelligently. I know well that councils with Indians are like caucuses with white people. In the white men's caucus a few men dominate the entire meeting, and it is the same with an Indian council, the more aggressive dominate and control; those who are timid are passive and allow resolutions to be vetoed and frequently join in the vote against their best judgment. I have that confidence in the Indians of the Standing Rock Agency, and so high is my opinion of their ability that I am satisifed from the expression of the Indians in our council here the past two days that many of

them who were present felt as Charging Eagle has just expressed himself.

Some men, whites as well as Indians, after they have taken a stand dislike very much to recede from the position they have taken, but if a man has given a question sufficient thought to become satisfied that his first view taken of the matter was not correct he is fully justified in changing his mind and so asserting himself.

I wish to compliment Charging Eagle on the manly manner in which he has expressed himself, he being the first to get up and make a speech on that side, although I am confident there are many others who think as he does. He has certainly taken a practical common-sense view of the question for the interests of all you people, and I hope the rest of you will come around to his way of thinking. I, however, deem it unnecessary to continue our council any longer. If you wish to remain here and talk it over among

yourselves and desire to let me know of any change that may be in line with the views expressed by Charging Eagle, I would be very glad to hear from you to-morrow morning. I will not leave until Thursday morning. I had advised the agent at Cheyenne River to have the Indians assembled to meet me Friday morning at 10 o'clock, but will have to telegraph him that I will not be able to meet them until Saturday morning on account of the notes of our councils to be transcribed, and during my stay here you are at liberty, any of you, to express yourselves. Come and see me at any time or come and see your agent in relation to it. Remember, my friends, it must be of your own violition. I don't wish to urge you. I have placed the matter before you as clearly as possible, and knowing as I do that it would be for your best interest and would be appreciated by the officials of the Department upon whom you must rely for securing

a diminished reservation, I would be very much pleased to see you recede from the position you have taken. You need not adopt it, but as I have said, leave it with the Commissioner and Secretary of the Interior to act for your best interests in determining upon the line for the legislation to be enacted.

HIGH BEAR. I suggested here before, and again last night, and this the third time, in favor of the line that the inspector has drawn on the map there, and also Charging Eagle and One Bull and Thomas Frosted. There are four of us who have spoken in favor of the line the inspector has asked us to adopt. Some time ago we had an argument similar to this which caused a war, and we want to cease having wars, and therefore we made peace through a missionary. Of course, I do not wish the reservation to be thrown open against the will of the young people here, and therefore I will request, as my own personal opinion, that the boundary line mentioned by the inspector be adopted.

OTTER ROBE. It is our wish that since the four men whom we have appointed have finished we should go home. We have authorized these four people to represent the minds of the Indians in council. One of them, Thomas Frosted, has changed his mind and had made a speech which is different from the minds of the Indians, which he has no authority from the Indians to do. One of the speakers, John Grass, has gone home, and all the speeches have been noted down by the stenographer, and whatever he had to say on the proposition is down, and all we have to do now is to see that the statements made by the four speakers are forwarded. We can not very well try these propositions over again, for they were decided last night, and that was done once and for all. We agreed to spare only 29 townships and that is all we can spare, and when we consider the number of Indians located within that space of ground, to go over that would be an injury to the Indians.

INSPECTOR MCLAUGHLIN. My friends, I wish to say to you in closing that I am very much pleased with the orderly manner in which our council has been conducted. I am merely here as the representative of the Government to present this matter to you and advise you what I deem for your best interests, and I shall follow that course to the end until I get this matter off my hands, and do everything possible in presenting the matter to my superiors and committees of Congress.

I know how the Indians feel when it comes to parting with any of the reservation lands. They have been accustomed to having a large tract, a regular domain over which to roam, and they very reluctantly bring themselves to consent to anything that will reduce their reservation. My friends, you must prepare for a gradual reduction of your reservation until you eventually have only

your own allotments, and you are favored by having more land than the ordinary homesteader in the West receives.

I am noted throughout the United States among every tribe of Indians for telling them the truth. In all my public talks with Indians I have told them the truth to the letter. I do not build up any false hopes in them, and I therefore wish to you, my friends, that while your decision will go forward from me as you have spoken it. I can assure you that it will not be accepted, and that if the Secretary, the Commissioner, your agent, and myself can succeed in holding your western boundary to the blue line as marked out on this map, dividing ranges 23 and 24, we will have accomplished all that can possibly be hoped for you. I promise you, my friends, that everything I do in this matter will be for your future interest and I shall endeavor to have a diminished reservation secured to you.

I am pleased to have had an opportunity of visiting your reservation again, and meeting you here, and wish I could remain longer and see more of you, but business is pressing, and it is for the good of you people, and the people of the Cheyenne River Reservation that I wish to get back to Washington as soon as possible to lay this matter before my superiors that they may submit it to Congress before further action is taken on these bills.

I was your agent for fourteen years, and I shall always have your best interests at heart, and any time I can render you any service I will cheerfully do it.

I thank you for the courteous treatment you have shown me, and the orderly manner in which our council has been conducted. I shake hands with each and all of you and bid you good bye.

(Council adjourned at 11:10 p.m. sine die.)

I hereby certify that the foregoing thirty-two (32) typewritten pages is a correct transcription of shorthand notes taken by me of council held by James McLaughlin, U.S. Indian inspector, with the Indians of the Standing Rock Agency, North Dakota on March 9 and 10, 1908.

Watson C. Randolph, Agency Clerk.
Standing Rock Agency,
Fort Yates, N.Dak., March 11, 1908.

EXHIBIT NO. 2.

Proceedings of a council held at the Cheyenne River Agency, South Dakota, by James McLaughlin, U.S. Indian inspector, with the Indians of the Cheyenne River Reservation, in the State of South Dakota, for the purpose of obtaining an expression of views of said Indians with reference to the opening of their surplus lands to settlement contemplated by Senate Bill 1385 and House Bill 17884, Sixtieth Congress, first session.

Council convened Monday, March 16, 1908, with Agency Superintendent Rastall. Special Allotting Agent Deets, G. K. Sellers, allotting clerk, and sixty-three Indians in attendance, with Allen Fielder and Harry Woods, interpreters.

SUPERINTENDENT RASTALL. My friends, you have been called here to-day to listen to Colonel McLaughlin whom you all know and who needs no introduction to you. He is here to explain to you a matter which is of great importance to all the Indians on this reservation, and I am sorry that we could not have had more of the people from the outlying districts here to-day. But I hope that each of you will listen and pay strict attention to what Colonel McLaughlin has to say, so that you can tell all those who are not present what transpires here to-day.

Many of you have talked to me about the opening of the reservation, and I have repeatedly told you that it would come sooner or later, but I

am free to admit that it has come sooner than I expected.

While you may have your opinion and I may have my opinion as to the benefit to be derived by you in opening the reservation, yet it has come to a point where, no matter what you and I think, Congress is about to take some action, and the best thing now for the Indians is to make the best bargain possible with the Government for the opening of the land, as will be suggested by Colonel McLaughlin.

I shall be very glad to advise you on any questions which may arise and to help you to arrive at any agreement or provision which you may wish to make with the Government in regard to the opening of the reservation or part of the reservation.

Colonel McLaughlin will now explain to you the law which is now pending in Congress relative to this matter.

INSPECTOR MCLAUGHLIN. My friends, I am pleased to meet you and to see so many representative men of the reservation present. Owing to the spring thaws the roads are in such condition as to make traveling very difficult, and the long distances that some of you have had to come in reaching here has made the journey a tedious one. The breaking up of the streams between Fort Yates and this place caused me a delay of two days in reaching your agency, but I am glad to have reached here safely and to find so many of you awaiting my arrival.

I am well known to all of you, which makes any extended preliminary talk unnecessary, therefore I will proceed at once to state the object of my visit to your agency at this time.

I have been sent here by the Secretary of the Interior to submit and explain to you certain legislation now pending in Congress, which contemplates the opening of the surplus lands of your reservation to settlement after allotments have been made to all persons entitled thereto.

There was a bill introduced in the United States Senate by Senator Gamble, of South Dakota, on December 9 last, a little over three months ago, which provides for the opening of that portion of your reservation embraced in Schnasse County, and another bill was introduced in the House of Representatives by Congressman Hall, of South Dakota, on the 24th of last month, three weeks ago to-day, which latter bill provides for the opening of all of the surplus lands of the Cheyenne River Reservation, the word surplus lands in this instance meaning all of the lands of your reservation remaining unallotted after allotments have been completed to all of those entitled to allotments under existing laws who have not heretofore received such allotments.

I have copies of both of the said bills with me, which I will read and explain to you, but before entering upon an explanation of the pending legislation I desire to advise you of a certain

decision of the United States Supreme Court which has a direct bearing on the question which you are to consider and express your view upon.

In considering the qeustion you must bear in mind that the law vests in Congress the power to open Indian Reservations without obtaining consent of the Indians or without even consulting them regarding it. This was determined by a decision of the Supreme Court of the United States in what is known as the "Lone Wolf case," in a decision handed down by that court on January 5, 1903--five years ago last January.

A Kiowa Indian chief, named Lone Wolf, objected to certain Congressional legislation which opened all of the surplus lands of the Kiowa, Comanche, and Apache reservations to settlement after allotments to Indians belonging thereon had been completed, and, acting for himself and certain other members of his tribe, instituted a suit against the Government enjoining the Secretary of the Interior from proceeding in the

premises. The case was ultimately carried to the Supreme Court, which is the final interpreter of all law and from which decisions there is no appeal, and the decision of that court was in substance: that Indians are wards of the Government; that the Government is the guardian of the Indians; that a guardian has the right to do that which is deemed best for the ward; therefore that Congress has the right to open Indian reservations by legislative enactment without obtaining the consent of the Indians occupying them or without even consulting them thereto.

This is the situation as to the power of Congress to open the surplus lands of Indian reservations, but the Secretary of the Interior and Commissioner of Indain Affairs desire that Indians be consulted and their views ascertained before legislation is concluded for the opening of their reservations, and this is why I am now here, having been sent to confer with you relative to the proposed legislation affecting your reservation.

I will now proceed to read and explain the two bills referred to, both of which are now pending in Congress:

Inspector McLaughlin here reads and explains the provisions of Senate bill 1385 and House bill 17884, Sixtieth Congress, first session, which consumed one and one half hours.)

INSPECTOR MCLAUGHLIN. I have now read and explained the two bills affecting your reservation and the question is before you for consideration and an expression of your views thereon.

You need have no hesitancy in expressing yourselves freely, as I am here not only as the representative of the Government in this instance, but also as your friend, whom you have all known for many years, and I shall endeavor to answer fully and clearly any question bearing upon the matter which you may wish to have further explained.

These bills will not be further acted upon until the report of my conferences here reaches the Department, but I, having been unavoidably delayed in reaching here, time is pressing and you should, therefore, act with reasonable promptness in considering the matter and expressing your views thereon.

I would suggest that you consider the provisions of both these bills carefully and in a businesslike manner. Agree among yourselves upon some compromise measure between the two bills which may receive the approval of the Department and be acceptable to Congress.

Determine upon how much, and what portion, of your reservation you are willing to relinquish; also as to the manner of payment, which, however, must be in accordance with the general provisions of the said bills.

While Congress has the power to open all of the surplus lands of your reservation, as contemplated by the Hall bill, I have the hope that you

may meet the situation in a businesslike manner with some reasonable proposition that would be favored by the Secretary of the Interior and Commissioner of Indian Affairs, which would justify them in submitting it to Congress with their recommendations that it be adopted as a modification of the two bills merged into one, and through which I am reasonably certain that a diminished reservation may be secured to you for many years to come, within which all children born to you for many years would receive allotments.

My friends, I am not here of my own volition, but sent by my superiors to present and explain this matter to you. These bills have been introduced in Congress and legislation embracing their essential features is liable to be enacted during the present session of Congress unless you meet the question in a commendable manner.

I know the sentiment of the Indians regarding their reservations and of their desire to hold

them intact, which is only natural, but for the Indians to hold large tracts of unused land is now impossible, my friends, and you must bring yourselves to accept the inevitable, and rely upon the Department to obtain for you reasonable compensation for the lands you do not need.

Large reservations were possible in the past, but there was then what was known as a frontier.

That was when the principal portion of the population of this country lived east of the Mississippi River, but the tide of emigration from European countries to the United States forced home seekers constantly westward from the east and later on eastward from the west until the two waves met and obliterated the so-called frontier.

There is no more frontier where settlers may find homes readily, and the steadily increasing population of the country demands all available land possible for the incoming settlers. The demand for land for home seekers is now so great

that Senators and Congressman are being constantly urged by their constituents to open additional lands to settlement, and the sentiment in Congress to open Indian reservations has been growing stronger each succeeding year for some years past, until the sentiment now prevails that Indians may only retain what land they actually need and can make proper use of.

I was for many years in favor of leaving the boundaries of Indian reservations undisturbed; but restults of the system have caused me to change my mind relative to same, and I now believe, even if such were possible, that large reservations for Indians, much of which is not occupied by them, is not for the best interests of the Indian occupants. I now believe that it will be manifestly better for the Indians to have their surplus lands opened to settlement, as it brings in white settlers among them from whom the Indians may more readily acquire the white man's civilization and industrious habits, and it insures

a home market for all products raised by the Indians.

To meet the question now before you, a compromise between the two bills, which I have explained is advisable, such as might be accepted as a modification of the Gamble bill and the Hall bill, which latter if enacted into law would open all the surplus lands of your reservation after allotments are complete; and I am quite confident that the Gamble bill will not be enacted as introduced, but will be amended to include a much larger tract of land, as Senator Gamble said to me the day I left Washington on this assignment that he desired the pending legislation to cover a much larger tract, but consistent with the best interests of the Indians.

You have a very large reservation, certainly much greater than you need and much greater than you will be privileged to retain, and I now wish to hear from you regarding the matter which

I have endeavored to place before you very clearly.

It may be well for me to inform you that the Indians of the Standing Rock Reservation have met this question very commendably and I trust that you may see the wisdom of treating it similarly, by which you may feel the satisfaction of having had a voice in the contemplated opening which is sure to come, for which, however, you will be fully compensated through the provisions of the bills, which I have explained, and which method of disposal and manner of payment as provided in said bills would doubtless be incorporated in any modified measure enacted.

Should you wish to confer among yourselves before expressing your views regarding the matter we may adjourn for a time that you may consider the question. I leave this to yourselves to decide.

I am here for this purpose only, and while I am desirous of getting through as soon as possible I do not desire to hurry you and will meet your wishes as to whether you prefer to proceed now or adjourn for a time that you may talk the matter over among yourselves.

JAMES CROW FEATHER. There are more of us people than are here to-day and we have a way of doing business in matters of this kind, which you first started. It is our business council, which you showed us how to do business by, on this reservation. You told us, when any business came up in regard to the lands for all of us to get together, have a chairman, and do it like the white people; that a general council of the Indians should first express their opinion regarding the matter, and they then turn it over to the business council to act upon. Since that time we have been doing business that way and we like the plan, and in view of this system we do not feel that we might express our opinions

just to this assemblage and with only so few here. This matter is of interest to the whole tribe. I am chairman of the business council, and we have rules regarding the matter, and I would like to carry them out. You say that you will let us talk among ourselves. I agree to that. We will talk only on this one thing whether or not we will hold a council.

I would like to have all the people together when we do business regarding land, for heretofore we have done business with them scattered over the reservation, and you know it has done us no good. Since I have been chairman of the council I have always tried to get them together when I can, but in this case it is impossible to get them all here.

INSPECTOR MCLAUGHLIN. I am very much pleased with the remarks of the chairman of your business committee. As I said in the beginning, I would have liked to have had more of the people here, but am pleased to see so many, considering

the condition of the roads and the inclement weather.

The matter which I have presented to-day is a matter you doubtless all have heard of and which had doubtless been discussed among you for some weeks past.

Some of your people have talked to me over the phone from White Horse and Cherry Creek and they would have liked to have been here to-day, but the roads being so bad it was impossible for them to attempt the journey, and it is impossible for me to consume the time that would be necessary for them to get here after the roads become passable. I am desirous of getting the matter before the Department as soon as possible, so that it can be considered and submitted to Congress, and therefore suggested that we adjourn for a time for you to discuss the question among yourselves. I will return at any time to answer any questions which you wish to ask.

In a very short time we will have typewritten copies of all that has been said here to-day, and I will furnish you with a copy of it for reference in your deliberations.

Not wishing to keep you here unnecessarily long, we will now adjourn until seven o'clock, and if you are not ready then we will adjourn until to-morrow morning, but I would like to hear from you this evening.

We will adjourn until such time as you send for me, or until seven o'clock.

(Council here adjourned, at 3.15 p.m., to meet at 7.00 p.m.)

Council reconvened at 7.30 p.m.

INSPECTOR MCLAUGHLIN. We have again met in council and I hope to have some expression from you on the question before you. I wish to say, my friends, that you were specially favored in having a representative of the Department sent out to confer with you relative to the opening of

your reservation with the matter already before Congress.

The Flathead and Blackfoot reservations in Montana, both very large reservations, have been opened to settlement without asking the concurrence of the Indians. Allotments have been recently completed on those reservations and commissions are now engaged in appraising the surplus lands in a similar manner as is provided for your surplus lands.

I was sent to Fort Peck Reservation, Montana, last September, and negotiated with the Indians of that reservation for opening all of their surplus lands after allotments have been completed, exactly as is provided for your reservation. I entered into a regular agreement with them which was ratified by Congress about two months ago.

On the 17th of last month I left Crow Agency, Montana, after having obtained the consent of those Indians to open all their surplus

lands. They had all been allotted except children born the past two years. The bill for opening that reservation was introduced by Senator Dixon, of Montana, and the Indian Commissioner desiring to have the concurrence of the Indians rather than have the reservation opened arbitrarily sent me out there to explain the Dixon bill as I have done with the Gamble and Hall bills here. The Indians desired three changes in the legislation which I believe will be accepted by Congress, and the Indians appreciated the interest taken by the Department in the matter.

The bills introduced for Standing Rock and Cheyenne River reservations by Congressmen from the respective States in which the lands are situated, providing for opening all the surplus land of the reservations will doubtless become a law in a modified form. After I explained the matter to the Standing Rock people very fully they saw the wisdom of meeting the wishes of Congress in a very reasonable manner, by which

I am quite confident that they will have a diminished reservation created, which will remain so for many years, and it will enable them to have allotments for the children born to them for many years to come. It is my desire that you meet the question in the same manner as Standing Rock. You are one people; you are of the same blood; you live under the same treaty and I hope you will meet the matter similarly. I am quite confident that when I submit my Standing Rock Council minutes to the Secretary of the Interior that he and the Commissioner will be very much pleased, and submit it to Congress with recommendation that it be accepted, which would leave the Indians a permanent diminished reservation. As many of the Standing Rock Indians have taken allotments in the portion that will be opened it will leave them about 500,000 acres of surplus land on the diminished reservation; and on this reservation, judging from what I have heard the Indians saying to the alloting agent to-day, in

desiring lands in the parts to be opened, that you will have fully a million acres of vacant lands within the lines I have suggested.

My friends, I appreciate the fact that you are reluctant to act in the premises with so many of your people absent, but considering the weather and the condition of the roads, I regard this as a fair representative gathering. I would now like very much to have an expression from you. Whether favoring the opening or not, let me know the sentiment of this assemblage.

As I said before, I am here not only as a representative of the Government, but as your friend, and you need have no hesitancy in speaking freely to me.

Just one word more. My friends, you will be perfectly safe in allowing the Secretary of the Interior and the Commissioner of Indian Affairs to determine upon the lines for you. You may wish some changes in manner of payment, in which case you should mention them. I am confident

that your requests will be duly considered, else I would not be here in council with you this evening.

JAMES CROW FEATHER. You mentioned Lone Wolf's case in your address here to-day. I wish to say something regarding him. I understand that Lone Wolf refused to sell his land or cede it to the Government, but the Government took it. The way I look at that, the Government did right in selling his land if it was necessary to sell it in order to give him a living. I understand that it was taken to the Supreme Court and that it was decided against him. The Government ought not to take our case like Lone Wolf's case. We are willing to give up part of our reservation, but the Government ought to give us time to consider these matters. The Indians are scattered out over the reservation holding councils and I don't know as you can get anything out of them when they all get together.

I say again as I said to-day that the whole tribe ought to be together in considering this important matter. You were sent here to talk to us and you knew before you came what we were; you know us well. This tribe of Cheyenne River Sioux never refused the Government anything that the Government asked them to do.

As I said before, we may decide one way, perhaps Whitehorse camp another, and Cherry Creek another, and when you get all together I don't see how you can make anything out of it.

I understand that you have little time to spare, as you want to get back to Washington, but I am perfectly sure that the people here will not say anything against opening the lands. What I want is for you to give us time to consider. You can go home if you want to; we will try to do as you ask us to do. We would like to talk over this matter; we can understand it fully and there are a good many here who can't understand it. We would like more time.

INSPECTOR MCLAUGHLIN. One point I know you will be pleased to give expression on and I would very much like to know what is in your minds regarding it, and the reason I mention it is that I have heard it spoken of by the Indians to-day outside of the council--that they do not like the manner of payment provided for in the two bills which I have read to you.

I desire to ascertain the sentiment prevailing here regarding this, because when I reach Washington something may be needed to start in upon at once, and if you leave this matter of payment untouched it is liable to become a law as it is. Therefore I would like to hear your opinions regarding it.

HARRY WOODS. I think that is a matter we ought to consider. Our agent received a letter not long ago asking him to send a list of names of Indians that he thought were able to do their own business as to moneys, etc. I would like to know how this law or bill here would affect that.

MAJOR MCLAUGHLIN. It would not affect that in the least.

HARRY WOODS. I think this ought to be inserted in the bill, for a good many of us are thinking of filing an application to have any money due us paid direct to the Indians. We do not like this matter of being wards of the Government and having everything done for us by the Government. It is the same thing every treaty we make. The Government makes rules and laws to govern us and wants us to become civilized, but when we want to do anything they turn around and say we are still wards. We understood once that when a man took he was a citizen and not a ward. They told us these things and a good many of us liked it, but now they say we are still wards.

The money to be derived from the sale of the land won't be very much and I don't think it would hurt anybody to pay it out to us in full,

and I would like the Secretary to have this inserted in the bill.

INSPECTOR MCLAUGHLIN. That is, you want the money paid annually instead of having it held in trust for ten years?

HARRY WOODS. Yes.

INSPECTOR MCLAUGHLIN. Are you voicing the sentiment of the Indians assembled in this council when you express that desire?

HARRY WOODS. Yes.

INSPECTOR MCLAUGHLIN. I wish you to understand, as most of you doubtless do, that the benefits to be derived from the sale of tribal lands belong to the tribe, every man, woman, and child having an equal share.

The Department has ruled that the shares of minors be placed in the Treasury until the minor becomes eighteen years of age. In most States the age is twenty-one, but the Department has ruled that for this purpose the legal age shall be eighteen years.

At each tribal payment the share of the minor is returned to the Treasury, where it draws three per cent interest. When the minor reaches eighteen years of age he receives the entire amount. During the years of minority all payments of the interest are made to the parent or guardian of the minor. As an incentive to build up manhood in the Indians and teach them to look after their own affairs the Commissioner has fixed upon a plan which enables every parent or guardian to draw money for their minor children or wards. He ascertains by careful inquiry whether the parent or guardian is sober and industrious and capable of handling the money properly. If he is, he pays the money to him. After inquiry, if satisfied that the party is worthy of trust, he places his name on what is known as the "roll of honor." All persons named on the roll of honor handle the money of their minor children or wards.

On the Rosebud Reservation there are about 100 names on the roll of honor, and they receive the regular per capita shares of their minors from the sale of their Gregory County lands.

We never had a Commissioner who has given the Indian question more earnest thought and study than our present Commissioner. You may understand that from the letter which he sent to your agent, as referred to by Harry Woods, asking for a list of those who are able to look after their own affairs, etc.

I am very much pleased with Harry Woods's remarks. It is my desire to see every Indian a citizen just as soon as he can conduct himself as one. Harry Woods's speech will show the Secretary and Commissioner, who will read the minutes of this council, that the Indians are looking forward to becoming independent.

ALLEN FIELDER. You have told us to-day that the members from our State have bills in

Congress to open up a part or all of our reservation. We heard this some time ago. A good many of us have had that thought in mind and we have thought over the matter. I am in favor of opening the reservation and don't think there is any use in our trying to fight it.

I am in favor of opening only part of it; we want to reserve some for the future, a diminished reservation. This matter being now presented to us, what we have to do is to consider what part of the reservation we want to give up. Senator Gamble in his bill says Schnasse County. I might want that part mentioned in Gamble's bill and the "cattle trail" included (the north tier of townships).

The next thing in the bill that we should consider is about the school lands. The price of $1.25 per acre provided in the bill is not satisfactory to me. I understand that the Standing Rock Indians have asked $2.50 per acre for the school

lands, and I agree with them and demand the same price.

As to the sale of our lands, for my part I would want the Government to buy it from us outright, and then let the Government sell it. My reason for this is that we sold some land south of the Cheyenne River and we never got any thing out of it. We got three million dollars placed on deposit in the beginning, and it took all the proceeds of the land to pay the expenses of the sale.

There being so much vacant land I am afraid we will not get very much out of our lands under the present bill, as it will take years for all of the land to be disposed of to settlers.

Section five of Senator Gamble's bill, where it speaks of reserving town sites, I am in favor of. Somewhere in Senator Gamble's bill it mentions reimbursing the Government for what is expended in appraising the land, etc. I am not in favor of that, for if the Government wants our

land, and if the people want it, let them pay for it, otherwise it will take every cent we get out of our lands to pay these expenses. I am in favor of what Harry Woods said about payment of proceeds of sales direct to Indians that are capable of handling their own affairs, i. e., the money to be paid annually.

That is all I have to say.

INSPECTOR MCLAUGHLIN. I wish to explain a matter to you people and shall endeavor to make it clear. It is with reference to Allen Fielder's speech and his reference to the cession of 1889, whereby three million dollars were placed in the Treasury to your credit, to draw 5 per cent interest while there, the interest to be paid annually. The interest on that fund amounts to $150,000 annually, seventy-five thousand of which is paid in cash and seventy-five thousand expended in education. That $3,000,000 fund is still in the Treasury at interest for six agencies,

Santee and Flandreau having been paid in full. You will receive your portion of that fund just the same as the amount due the Santees has been paid to them within the past two years.

As to the sale of the land, you will remember that it provided for $1.25 per acre for all land taken the first three years, seventy-five cents an acre the following two years, fifty cents per acre for the following five years, and all remaining undisposed of at the expiration of ten years from date of opening was to be paid for by the Government at fifty cents per acre. Therefore every acre has been disposed of in so far as you having received credit for it and the same is shown on the books of the Treasury. Allen Fielder's statements were pertinent as to that, it being true that you people have not received anything yet from the proceeds of that land, except your interest in the permanent fund, but all other Sioux reservations have been receiving benefits annually. Every allottee over eighteen

years of age is to receive the benefit of section 17 of that act, which is: A yoke of cattle with yoke and chain, or a pair of American mares and set of harness in lieu thereof; one wagon, two cows, a plow, harrow, shovel, hoe, and fifty dollars in cash.

You must remember that there are a great many Sioux and when every one of them over eighteen years of age receives these benefits it will take a great amount of money, and this is what the money derived from the cession of 1889 has been used for. Each and every one of you will receive what has been provided for by section 17 of that act. It is now believed that when the allotments are complete the money derived from that sale will be exhausted and the Government will be out of pocket in the transaction, for the reason that is has been ruled by the Secretary that the $3,000,000 permanent fund can not be used for that purpose. The sale of that land was entirely different from the manner of payment

provided for the proposed sale of your land. The expenses of sale of your land under these bills will be very little compared to the amount of money you will receive. There are only three commissioners; one of these is to be from the Department, an official of the Indian Bureau; the second is to be a citizen of South Dakota, and the third a member of your tribe. Judging from the demand for land and the way it has increased in value within the past three years, I fully believe that after all expenses are paid for disposal of these lands that you will receive $2,000,000 from the proceeds. I have been reliably informed that the railroad, which is now at Le Beau, will cross the Missouri and run up the Moreau River, which will enhance the value of these lands very materially.

I have been told that along that line of the Milwaukee road running through the Standing Rock Reservation, every quarter section of land within twenty miles of the line of the road, clear

out to the Montana line, has been filed upon. While I was at Oak Creek last Thursday a train went through there in two sections loaded with emigrants and their supplies.

With reference to the Government paying you a lump sum, I wish to assure you that such has not been entertained by Congress for the last seven years. Congress will not accept anything of that kind. I will show you an advantage in this.

In 1901, six years ago last fall, I made an agreement with the Rosebud Indians for the payment of a lump-sum consideration of $1,040,000. Congress rejected it, but provided for another plan which is nearly similar to this of yours, and the Indians have received about $1,800,000 for that tract of 416,000 acres. That act provides that at the expiration of eight years all land not taken by settlers is to be sold to the highest bidder for cash. The sale is made by the register and receiver of the land office, and has to be

paid for as appraised. The register and receiver of the United States land office are Government officers and will be paid by the Government. You get the exact appraised value for every foot of land which is to be opened. The development of this country has been so rapid within the last few years, and there being now very little available land, with the population steadily increasing, the demand will be great. Towns will be built on both this reservation and on Standing Rock Reservation and the Indians will get the benefit of it under the provisions of these bills.

I will say that I am very much pleased with the council we have had, and everything I have said and all that you have said will be typewritten, one copy to go forward with my report, the other to be left with your agent for future reference.

I am aware that you are reluctant to express yourselves as freely as you would if all the people were here, but the weather has been so

unfavorable that they could not get here. I am glad, however, that you have talked as freely as you have. I shall report everything connected with this council and I am confident that your interests will be well guarded by the Secretary and Commissioner of Indian Affairs.

I am going direct to Washington from your agency and my reports will go in the following order: Crow Agency, first; La Point, Wis., second; Standing Rock and your agency will go in practically together. Should anything further occur to you it will be a few days before I reach your report and you can send the paper to me so that I may make it a part of the record and action can be made on it.

I deem it unnecessary to continue the council any longer. I have explained the matter very carefully and fully and I am noted for telling the truth to Indians. I use no honeyed words so that they may not be disappointed.

I remain here all day to-morrow, and if I can not cross the river will be here some days longer until the ice runs out. If there is anything further you wish to bring up I shall be very glad to meet you again to-morrow.

That is all I have to say, and unless there is something that you wish to say, the council will close.

JAMES CROW FEATHER. I understood you to say in your talk to us to-day that you did not want to rush us, and anything done in a hurry is never done right. I could have got up here and expressed my opinion in regard to this matter, but what I want is to have all the tribe agree upon one thing.

INSPECTOR MCLAUGHLIN. In this matter you will be guided by your agent; he is the person to go to when in doubt. He represents the Government. I am very willing to meet your wishes and will hold your papers until two weeks from to-day before handing in my report.

This council is now adjourned.

Council adjourned sine die at 10 o'clock p.m.

I hereby certify that the foregoing nineteen (19) typewritten pages is a correct transcription of shorthand notes taken by me of council held by James McLaughlin, U.S. Indian inspector, with the Indians of Cheyenne River Reservation, South Dakota, on March 16, 1908.

G. K. Sellers, Stenographer,
Cheyenne River Agency,
South Dakota, March 17, 1908.

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No. 82-1253

In The

Supreme Court of the United States

October Term, 1983

HERMAN SOLEM, *et al.*,

Petitioners,

vs.

JOHN BARTLETT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Did the Act of May 29, 1908, 35 Stat. 460, implicitly terminate federal Indian jurisdiction over the portion of the Cheyenne River Sioux Reservation that the Act opened to settlement?

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STATEMENT OF THE CASE

John Bartlett, respondent here and habeas corpus petitioner in the District Court, pleaded guilty to a South Dakota State charge of attempted rape on May 2, 1979. He was sentenced to ten years in the State Penitentiary at Sioux Falls, where he is now held. The events leading to the charge occurred at Eagle Butte, South Dakota, and the particular tract of land where these events occurred was owned by a non-Indian at the time of the offense. *See* State's Br. 3. Eagle Butte is in the part of the Cheyenne River Sioux Indian Reservation opened to non-Indian settlement by the Act of May 29, 1908, 35 Stat. 460. Bartlett is a member of the Cheyenne River Sioux Tribe, as is the complaining witness in his case.

In 1981 Bartlett sought habeas corpus relief from a state court, and relief was denied. No appeal was taken, and he then sought habeas corpus from the Federal District Court. These habeas corpus petitions were filed *pro se*, and neither court appointed counsel for Bartlett. The petitions asserted that the state courts lacked jurisdiction over Bartlett because his alleged offense had occurred in Indian country as defined by 18 U. S. C. § 1151. The Federal District Court granted the petition without trying any issues of fact. Following prior decisions of the Eighth Circuit Court of Appeals, the court held that the locus in quo was within the Cheyenne River Indian Reservation, so that the State had no jurisdiction. Pet. A1-A8.

The State appealed to the Eighth Circuit Court of Appeals, and Bartlett obtained legal counsel for the first time. Bartlett's counsel moved the court to adopt a portion of the record in *United States v. Dupris*, 612 F. 2d

319 (8th Cir. 1979), *vacated as moot*, 446 U. S. 980.[1] Counsel for local counties as amici curiae supporting the State lodged a lengthy appendix to their brief. Portions of the latter are appended to their brief in this Court.

The State sought and obtained in banc review by the Court of Appeals. After oral argument, the full court affirmed the District Court's holding that Eagle Butte remains within the Cheyenne River Reservation by a vote of 5 to 2. 691 F. 2d 420 (8th Cir. 1982).

Neither court below reached an alternative basis for habeas corpus within the scope of Bartlett's *pro se* petition, namely, whether Eagle Butte, the place of the offense, was a dependent Indian community within the meaning of 18 U. S. C. § 1151(b).

The issue here is whether the 1908 Act of Congress opening part of the Cheyenne River Indian Reservation terminated the reservation status of the area opened. The area in question is in western South Dakota all of which was reserved to the Sioux by the Treaty of June 29, 1868, 15 Stat. 635. The Act of March 2, 1889, 25 Stat. 888, ratified an agreement with the Sioux ceding much of the land reserved in 1868 but reserving six separate reservations including the Cheyenne River and Standing Rock Reservations. The Act of May 29, 1908, 35 Stat. 460, opened a portion of the surplus tribal lands in the western part of both reservations to settlement by homesteaders. The opened portion of the Cheyenne River Reservation includes Eagle Butte.

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[1]The *Dupris* record materials were added to the record in this case. The principal item is a report on the Cheyenne River Reservation by Professor Frederick E. Hoxie of the Newberry Library in Chicago. There are also 115 appendices to his report, comprising copies of archival records of the Reservation. Professor Hoxie was retained by the United States as an expert in connection with United States v. Dupris, *supra*.

The 1908 Act had its genesis in bills introduced by Senator Gamble and Representative Hall of South Dakota on December 9 and 24, 1907. S. 1385 and H. R. 17884, 60th Cong., 1st Sess. The Secretary of the Interior dispatched Inspector James McLaughlin to the Reservations to explain the bills to the tribes. On March 16, 1908, Inspector McLaughlin met with 63 members of the Cheyenne River Tribe. McLaughlin discussed the bills with those in attendance, a low number owing to bad weather. State's Br. A-48. No agreement was reached, and a tribal leader present, James Crow Feather, asked for additional time. McLaughlin agreed provided that a written report of the tribe's wishes reached him in Washington by the 28th. He did not receive a report by that time and filed his report on March 30. The Senate Committee reported out its bill two days later (April 1) and the Senate passed it on April 15. The House passed the bill on May 26, and it was signed by the President on May 29. State's Br. A-16.

The 1909 Presidential Proclamation officially opening the reservations described the lands to be opened as "all the nonmineral, unallotted, unreserved land within the Cheyenne River and Standing Rock Indian Reservations." Proclamation of August 19, 1909, 36 Stat. 2500.[2]

The 1908 Act was amended by the Act of February 17, 1910, 36 Stat. 196. Surplus tribal lands in the eastern part of the Standing Rock Reservation were opened to settlement by the Act of February 14, 1913, 37 Stat. 675. *See United States v. Long Elk*, 565 F. 2d 1032 (8th Cir. 1977). Both statutes were repeatedly amended thereafter to postpone the time provided for payment to the Indians

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[2]Professor Hoxie, *supra* note 1, determined that when the reservation was opened 55% of the tribe held allotments in the opened area. Hoxie Report *supra* at 38.

by the settlers. Unsold lands from both openings were temporarily reserved in 1934 and restored to tribal ownership between 1941 and 1967 by orders of the Secretary of the Interior authorized by 25 U. S. C. § 463.[3]

Eagle Butte is the capital and seat of government of the Cheyenne River Sioux Tribe, the location of the tribal court and jail. It is the location of the Bureau of Indian Affairs Agency for the Cheyenne River Tribe and of the Indian Health Service Hospital serving the reservation. Its population according to the 1980 census is 78.5% Indian,[4] and it includes much federal Indian land, necessitating the State's exacting showing of the particular tract where this case arose.

According to the 1980 U. S. Census, 65.6% of the resident Cheyenne River Sioux Indians live in the opened part of the Reservation, 34.4% live in the part not opened. The total census population of the opened part is about half Indian and half non-Indian.[5]

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[3]See Orders of June 12, 1941, 6 Fed. Reg. 3300; January 10, 1949, 14 Fed. Reg. 471; January 21, 1952, 22 Fed. Reg. 3693; December 13, 1965, 30 Fed. Reg. 15588; October 9, 1967, 32 Fed. Reg. 14276.

[4]U. S. Census Enumerated Districts, South Dakota Nos. A1812-14, A1822-27. *See* U. S. Census Bureau, 1980 Census Summary Tape File 1-A (South Dakota). These figures include non-Indian employees of the Bureau of Indian Affairs headquarters at Eagle Butte.

[5]U. S. Census Enumerated Districts, South Dakota, Nos. N009A-N0018, N10801A-N1830A, A0001-A0013B, A1800-A1838. *See* U. S. Census Bureau, 1980 Census Summary Tape File 1-A (South Dakota) and 1980 Final Census Enumerated District Maps (South Dakota). These figures do not take into account the probable undercounting of Indians. Indeed, the Attorney General of South Dakota admitted in his oral argument to the Court of Appeals that the opened part of Cheyenne River has an Indian majority.

SUMMARY OF ARGUMENT

Neither the Act of May 29, 1908, nor its legislative history makes any reference to reservation boundaries or to jurisdiction over the area opened. Hence, the State must try to meet its burden to show clear intent of Congress to terminate the opened area by inference and implication. The burden has not been met.

The Act's terms and legislative history describe a land sale transaction, nothing more. Its title and operative language are nearly identical to those held by the Court not to terminate in *Mattz v. Arnett*, 412 U. S. 481 (1973) and *Seymour v. Superintendent*, 368 U. S. 351 (1962) and are very different from the reservation areas held terminated in *Rosebud Sioux Tribe v. Kneip*, 430 U. S. 584 (1977) and *DeCoteau v. District County Court*, 420 U. S. 425 (1975). Other terms of the 1908 Act reserve all tribal mineral land, and land needed for agency, school, and religious purposes, in the opened area, showing the intent to continue significant tribal interest and activity in that area.

The State's effort to give the Court's *Rosebud* decision controlling force here is inconsistent with the Court's express caution in that case against a search for "absolutes". 430 U. S. at 588, n. 4. Also, there are basic differences in language, history, and circumstances between the two cases. The 1904 Rosebud act was "crucial" to the Court's decision. *Id.* In that case the tribe had formally agreed to a complete cession of all interest in its Gregory County lands. By contrast there was no agreement with the Cheyenne River Sioux Tribe, only a hastily arranged discussion of the proposed act with a small part of the tribe.

Despite the absence of an agreement, Congress expressly said it was carrying out what it thought were the Indians' wishes. This makes especially important the complete absence of any warning to the Indians or consent by them to the imposition of discriminatory State criminal jurisdiction over tribal members in the opened area. State jurisdiction would have been a very serious matter to the Indians in 1908, owing to the manifest hostility of State laws and institutions toward Indians at that time. For this reason, the rule that ambiguous statutes should be construed in favor the Indians should be strictly applied in this case.

The Act's provisions claimed by the State to meet its burden do not show the requisite intent of Congress. The phrase "reservation thus diminished" in context and common usage at the time referred to the tribes' diminished common land on the reservation, not to boundaries or jurisdiction. The Court of Appeals so concluded. *United States ex rel. Condon v. Erickson*, 478 F. 2d 684, 687 (8th Cir. 1973). The liquor amendment added in 1910 was one of numerous identical amendments added to most tribal opening laws between 1909-1920, many of which applied to intact reservations. These provisions were a reaction to the contemporary rule of this Court that defined "Indian country" for liquor control purposes based on land, title, not on reservation boundaries. *See Clairmont v. United States*, 225 U. S. 551 (1912). The State's reliance on the school lands provision is refuted by its legislative history.

Subsequent governmental treatment of the reservation, while not uniform, generally reflects the understanding that the 1908 Act did not terminate the area opened. Notably, the Interior Department first proposed in 1912 to move the Agency headquarters to Eagle Butte in the

opened area and eventually carried out the proposal in 1954. Also, the tribal court and police have exercised jurisdiction over the opened area continuously since 1908. The State's claim that the state and federal courts have recognized termination will not withstand analysis. Remarkably, no reported state prosecution of an Indian defendant exists before 1963, and during much of the relevant period, a state statute has asserted concurrent jurisdiction over reservations in the State making assertions of State jurisdiction ambiguous.

ARGUMENT

I. THE ACT OF MAY 29, 1908 PROVIDED FOR THE SALE OF TRIBAL LANDS TO NON-INDIAN-SETTLERS IN LANGUAGE AND UNDER CIRCUMSTANCES THAT REFLECT A CONGRESSIONAL INTENT TO LEAVE THE RESERVATION BOUNDARIES INTACT.

Neither the 1908 Act nor its legislative history makes any reference to jurisdiction or reservation boundaries. As a result, the State must attempt to demonstrate an intent on Congress' part to alter the reservation boundaries by inference and implication. *See Rosebud Sioux Tribe v. Kneip*, 430 U. S. 584, 586-87 (1977). Intent to disestablish cannot be inferred from the mere change in title. Reservation status is not dependent upon any property interest in the particular lands held by the Tribe. See 18 U. S. C. § 1151(a); *Mescalero Apache Tribe v. Jones*, 411 U. S. 145 (1973). Nor can intent be found in the federal policy reflected in the allotment and surplus land acts. To be sure, those acts contemplated the eventual termination of reservations, but the reservations were not terminated by immediate operation of the acts themselves:

> The [Dawes Act, 24 Stat. 388] permitted the President to make allotments of reservation lands to resi-

> dent Indians and, with tribal consent, to sell surplus lands. Its policy was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservation could be abolished. Unallotted lands were made available to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways.

Mattz v. Arnett, 412 U. S. 481, 496 (1973); *see also Seymour v. Superintendent*, 368 U. S. 351, 356 (1962).[6]

Rather, a particularized examination of the act in question, its legislative history, and surrounding circumstances is required to ascertain Congress' intent. *Rosebud*, 430 U. S. at 586; *Mattz*, 412 U. S. at 504-05. Unless that examination reveals an intent on Congress' part to separate certain tracts from the reservation, all tracts remain a part of it. *Seymour v. Superintendent*, 368 U. S. at 359. Since doubtful expressions in all such cases must be resolved in favor of the Indian people, the State must demonstrate by clear evidence congressional intent to disestablish the western portion of the reservation. *Rose-*

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[6]By 1908, Congress had determined that the assimilation timetable set out in the allotment act should be slowed and had taken steps to extend federal jurisdiction beyond that originally provided. In 1897, for instance, Congress expressly applied the Indian country liquor prohibition to Indian allotments. Act of Jan. 30, 1897, 29 Stat. 506. In 1906, Congress gave the President discretionary authority to extend the trust period of allotments in all cases. Act of June 21, 1906, 34 Stat. 325, 327 (codified at 25 U. S. C. § 391). See F. Cohen's Handbook of Federal Indian Law (1982 ed.) 613 n. 16. Most significantly, Congress also directed in 1906 that the extension of state civil and criminal jurisdiction over Indian allottees shall be delayed until the expiration of the trust period. Act of May 8, 1906, 34 Stat. 182 (codified at 25 U. S. C. § 349). These modifications of the allotment scheme show that by 1908 Congress was even less disposed to terminate reservation status immediately than it had been in 1887.

bud, 430 U. S. at 586-87; *DeCoteau v. District County Court*, 420 U. S. 425, 444 (1975).

In *Rosebud*, the Court cautioned that the search for "absolutes" in these cases "misapprehends the nature of our inquiry . . ." and that the relevant factors tend to vary from case to case. 430 U. S. at 588 n. 4, 598 n. 20. For example, the fact that Congress had referred to the Colville Indian Reservation as the "former Colville Indian Reservation" was not enough to show that the reservation had been disestablished. *Seymour v. Superintendent*, 368 U. S. at 356 n. 12. The relevant factors here, although not identical to those found elsewhere, do not show clear intent on Congress' part to disestablish the western portion of the Cheyenne River Reservation.[7] The legislative history and statutory language show, to the contrary, congressional intent to conclude a real estate transaction, nothing more.

A. The Legislative History and Language of the 1908 Act Show Congressional Intent to Arrange a Sale of Real Property Only.

The history of the 1908 Cheyenne River Act began, not with a cession agreement between the United States and the tribe, but with the introduction of a bill on December 9, 1907, by Senator Gamble of South Dakota. The bill, numbered S. 1385, was entitled, "A bill to authorize the sale and disposition of a portion of the surplus and unalloted lands in the Cheyenne River and Standing Rock reservations, in the States of South Dakota and North Dakota, and making appropriation and provision to carry the

[7]The State purports to apply the Court's general standard to the language, history and circumstances of the 1908 Act, but in fact seeks to wrap itself entirely in the *Rosebud* precedent. State's Br. 19-25. For that reason, its analysis is inconsistent with the very authority relied upon. Worse, the State mischaracterizes certain circumstances of the Cheyenne River Act and ignores others in its effort to conform the act to *Rosebud*. See, e. g., discussion, part B 1 below.

same into effect." The bill provided only for the sale of tribal lands to homesteaders and made no mention of jurisdiction over the opened lands or modification of reservation boundaries. *See generally*, State's Br. A-123 through A-128.

The bill was forwarded to the Secretary of the Interior, and he hastily dispatched Inspector McLaughlin to the two reservations to explain the bill to the tribes involved.[8] On March 16, 1908, Inspector McLaughlin met with a few members of the Cheyenne River Tribe for that purpose.[9] No agreement was reached with the tribe. *See* discussion below, part B 1. The Senate bill was reported out of committee on April 1 and, after minor modifications were made to accommodate the House, the bill passed the Senate on April 15, passed the House on May 26, and was signed by the President on May 29.

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[8]The Secretary's comments on the bill and Inspector McLaughlin's report were included in both the House and Senate reports on the bill, which are essentially the same. *See* S. Rep., No. 439, 60th Cong., 1st Sess. (1908); H. Rep. No. 1539, 60th Cong., 1st Sess. (1908). References herein to those reports will be to the appendix of the State's brief where possible; it contains the House report in its entirety.

[9]The State's brief asserts that Inspector McLaughlin met with "the Cheyenne River counsel." State's Br. 41. Assuming the State intended "council," the assertion is false. The Inspector met with a random group of Indians who could be summoned on short notice. Ironically, the meeting did not comport with the procedures for handling tribal business imposed by the Bureau of Indian Affairs. James Crow Feather complained, " . . . we have a way of doing business in matters of this kind, which you [McLaughlin] first started. It is our business council which you showed us how to do business by, on this reservation. You told us, when any business came up in regard to the lands for all of us to get together, have a chairman, and do it like the white people; that a general council of the Indians should just express their opinion regarding the matter, and they turn it over to the business council to act upon." State's Br. A-137-38. No business council meeting took place respecting the planned opening.

The terse legislative history is more remarkable for what is missing than for what is present. Absent from the consideration of the bill is any discussion of, indeed, any reference, to jurisdictional consequences of the proposed land sale.[10] There is no mention of withdrawal of protective federal jurisdiction from or state criminal jurisdiction over tribal members—presumably points of great interest given the contemporary attitude of South Dakota toward Indian people. *See* discussion below, part B 1. Instead the debate focused exclusively on traditional property-related issues—the money to be paid for lands purchased directly by the United States and the method selected for appraising the land. *See* House debate of May 26, 1908, 42 Cong. Rec. 7003-07.

The wording of the 1908 act reflects the same intent as events leading to its passage—the consummation of a real estate sale. The statute is titled, "An act to authorize the *sale and disposition of a portion of the surplus and unallotted lands in the Cheyenne River* and Standing Rock Indian reservations in the States of South Dakota and North Dakota, and making appropriation and provision to carry the same into effect." (emphasis added) Its operative language directed the Secretary of the Interior to "sell and dispose" of nonmineral, unallotted tribal land in the portion opened. The lands were to be disposed of under the homestead and townsite laws, and provisions were made for fixing the price to be paid. 35 Stat. 460, §§ 1-2.

The title and the operative language of the Cheyenne River act are virtually identical to that of the 1892 Kla-

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[10]The excerpts from the March 16 meeting between some tribal members and McLaughlin quoted in the State's brief relate to the land transaction itself. See State's Br., 42-43—where McLaughlin emphasized the excess of land owned by the tribe. *See also* discussion below, part B 2.

math act considered by the Court in *Mattz v. Arnett, supra,* and to the 1906 Colville act considered in *Seymour v. Superintendent, supra.* *See* Act of June 17, 1892, 27 Stat. 52; Act of March 22, 1906, 34 Stat. 80. In *Mattz* and *Seymour,* the Court determined that those statutes did not terminate the affected reservations:

> The Act did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards.

Seymour, 368 U.S. at 356; *quoted in Mattz,* 412 U.S. at 497. There is no reason in law or history why the identical language in the 1908 Cheyenne River Act should be construed to have a different effect.[11]

In those respects, the language of all three acts stands in sharp contrast to those considered in *Rosebud Sioux Tribe v. Kneip, supra,* and *DeCoteau v. District County Court, supra.* In *DeCoteau,* the operative language of the cession agreement read, "The Sisseton and Wahpeton bands of Dakota Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands

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[11]The State stresses the pressure of "familiar forces" on Sioux lands generally. *See* State's Br. 27-31. There is no evidence, however, that such pressure was brought to bear on the Cheyenne River Reservation. These lands were less fertile than those on other reservations and there was no great clamor by local non-Indians to open Cheyenne River. Instead, state "boosters" hoped to attract settlers to that part of the state by opening the reservation. *See generally* Hoxie, *supra* no. 1, at 46-49. Beyond the inaccuracy of its historical facts, there is nothing in the State's discussion suggesting that the would-be settlers were interested in anything more than title to Indian land. The alleged presence of "familiar forces", then, does not justify a construction of the Cheyenne River Act different from that of the Klamath and Colville Act.

. . ." Act of March 3, 1891, 26 Stat. 1036.[12] In the case of *Rosebud*, the 1904 Act also incorporated a voluntary cession by the tribe and was entitled, "An act to ratify and amend an agreement with the Sioux Tribe of Indians of the Rosebud Reservation, in South Dakota, and making appropriation and provision to carry the same into effect." The act's operative sentence was virtually identical to that of *DeCoteau*. Act of April 23, 1904, 33 Stat. 254. The Court viewed the operative language of those acts as "precisely suited" to the purpose of reservation termination and, primarily for that reason, held that the affected lands had been terminated. *Rosebud*, 430 U. S. at 592; *DeCoteau*, 420 U. S. at 445.

The respective presidential proclamations that opened the Cheyenne River and Rosebud Reservations also reflect this critical difference in language. The Proclamation opening the Rosebud Reservation declared that by agreement, "the said tribe ceded, conveyed, transferred, relinquished, and surrendered, forever and absolutely, without any reservation whatsoever, expressed or implied . . . all their claim, title, and interest of every kind and character . . . ." *Rosebud*, 430 U. S. at 602. The Cheyenne River Proclamation simply opened to settlement and entry "all the nonmineral, unallotted, unreserved lands within the Cheyenne River and Standing Rock Indian Reservations. . . ." Proclamation of Aug. 19, 1909, 36 Stat. 2500. The Secretary of the Interior implemented the proclamation by an order that referred to opening "the classified lands within" the two reservations. 38 Interior Dec. 160 (1909). As a result, the Cheyenne River Proclamation

[12]The Sisseton and Wahpeton agreement was ratified as part of the annual appropriations act for the Indian Department and, as a result, does not have a separate title. *See* Act of March 3, 1891, 26 Stat. 989, 1036.

does not reflect an understanding by the Executive Branch that the opening act altered the reservation boundary. *See Rosebud, supra,* at 602-03.

There are other indications in the Cheyenne River Act beyond its title and operative sentence that Congress intended to leave the reservation boundaries intact. Section one of the act authorized the Secretary of the Interior to reserve for the tribe's benefit lands in the opened area needed for agency, school, and religious purposes. State's Br. A-4. Section three of the act directed the Secretary to reserve mineral lands in the opened area "until further action by Congress." State's Br. A-6.[13] Those sections not only reflect the essentially proprietary nature of the act, but obviously contemplate a continuing tribal interest in the opened area and suggest ongoing activity usually associated with Indian reservations. Thus, Congress—faithful to its stated intention in the title and operative language of the act—arranged for the sale of certain tribal lands, nothing more. *Seymour v. Superintendent,* 368 U. S. at 355.

B. The Cheyenne River Act Is Unlike Those Considered in Rosebud in Circumstances and Intent.

The State overlooks the critical difference in language between the Cheyenne River Act and the 1904 Rosebud Act and focuses instead on superficial similarities between the Cheyenne River Act and the two later Rosebud Acts of 1907 and 1910, also held to have disestablished the affected lands. *See* State's Br. 19-24. Those similarities, however, reveal nothing of Congress' intent

[13]Even though the statute did not expressly so provide, Congress understood section three to require that mineral lands in the opened portion of the reservation "shall be held in trust for the Indians." Remarks of Mr. Sherman, May 26, 1908, 42 Cong. Rec. 7003. See also the 1909 Presidential Proclamation, opening only "nonmineral" lands to settlement. 36 Stat. 2500.

in the Cheyenne River Act because of the unique statutory context of the Rosebud Acts.

The *Rosebud* Court, aware of differences between the 1904 and later Rosebud Acts, indicated that it viewed the language and intent of the 1904 act as "crucial" to its inquiry. *Rosebud,* 430 U. S. at 588 n. 4, 606 n. 30. All parties in that case agreed that the two later acts simply carried forward the intent of the 1904 act, and disputed only the meaning of the 1904 Act. *Rosebud,* 430 U. S. at 606. The later acts were, as a result, construed as part of a broader statutory context in *Rosebud* and as continuing the established policy, undertaken with the Rosebud Tribe's consent, of constricting the reservation boundaries through land cession agreements. *Rosebud,* 430 U. S. at 606-15.[14]

Taken out of that statutory context, the later Rosebud acts teach little about the meaning of the Cheyenne River Act, notwithstanding apparent similarities. In the particulars singled out by the State, the dissimilarities between the Cheyenne River Act and the Rosebud act are manifest.

1. Absence of an agreement.

According to the State, Inspector McLaughlin negotiated the sale and disposition of the Cheyenne River lands at Congress' behest, and the resulting agreement was essentially identical in purpose to the Rosebud agreement, also negotiated by McLaughlin, which disestablished the affected Rosebud lands. State's Br. 31-36, 38-48.

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[14]Secondary evidence relating to the latter acts was cited by the Court as also indicative of "the continuing intent to disestablish the affected areas first manifested in the 1901 Agreement." *Rosebud,* 430 U. S. at 613. There is no reason to believe that those secondary factors would have been considered sufficient evidence of intent to disestablish absent the clear intent to do so expressed in the agreements and the 1904 act.

However, the parallels found by the State exist only because of its distortion of both the Cheyenne River and Rosebud negotiations.

There was in no sense, actual or practical, a negotiated agreement between the Cheyenne River Tribe and McLaughlin. There had been no prior council meetings or other discussions with the Cheyenne River Tribe before 1908 respecting the sale of surplus lands, much less a formal agreement. In fact, the 1908 act had been in the legislative works for some months before McLaughlin met with the tribe "for the purpose of obtaining definite knowledge as to their wishes." State's Br. A-30. The brief meeting took place on March 16, 1908, and was attended by sixty-three members of the tribe.[15]

At the March 16 meeting, McLaughlin explained the terms of the opening bill to the tribal members in attendance, but they did not consent or agree to the planned opening. James Crow Feather, chairman of the tribal business council, concluded the matter for the Indians with,

> I understood you to say in your talk to us today that you did not want to rush us, and anything done in a hurry is never done right. I could have got up here and expressed my opinion in this matter, but what I want is to have all the tribe agree upon one thing.

State's Br. A-161. McLaughlin himself understood that the matter had not been concluded and agreed to hold open his report for 12 days so that the tribe could respond. *Id.* On the fourteenth day following the meeting,

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[15]The Indian population at Cheyenne River was placed at 2,557 in 1904. *See* 1 Kappler *Indian Affairs—Laws and Treaties,* 1030 (1904), *cited in* United States ex rel. v. Erickson, 478 F. 2d 264, 686, n. 4 (8th Cir. 1973). These 63 were a random group of those available, not a representative body of leaders.

McLaughlin made his report to the Indian service without having received the tribe's response:

> Crowfeather, president of the Indian council requested that I defer submitting my report of the Cheyenne River Reservation for a few days in order that the Indians of the entire reservation might be enabled to assemble at some point for conference regarding the matter, and that they would forward me a paper reporting the result of such conference, which would reach me at Washington on or before Saturday, the 28th instant, but up to the present time I have not received the same, and have therefore concluded to submit my report as herein set forth.

State's Br. A-50, 51. Six weeks later Congress passed the Act.

Although these events and the absence of an agreement with the Cheyen e River Tribe appear plainly on the face of McLaughlin's report to Congress, the South Dakota sponsor of the 1908 act stated in committee reports that an agreement had been reached with the tribe. *See* S. Rep. No. 439, 60th Cong. 1st Sess. 4 (1908). These self-serving statements alone, however, cannot create an agreement where none exists. *United States v. Dupris*, 612 F. 2d at 337, (dissenting opinion).

The McLaughlin negotiations at Rosebud were much more significant and successful than those at Cheyenne River. In 1901, Inspector McLaughlin concluded an actual written agreement with the Rosebud Tribe, signed as required by prior treaty by three-fourths of the adult male population, by which the tribe agreed to "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation. . . ." *Rosebud*, 430 U.S. at 590 n. 8. The 1901 Agreement was not ratified by Congress, and McLaughlin was asked to negotiate a second

agreement with the tribe with somewhat different payment terms. The second agreement was obtained and as had the first, contained language "precisely suited" to disestablishment, but was signed by a majority rather than extraordinary majority of the tribe. *Rosebud*, 430 U. S. at 593-94. In 1904, Congress passed the first of the three Rosebud acts, and the act incorporated the entire text of both Agreements. *Rosebud*, 430 U. S. at 556. Those agreements provided an . . . "unmistakable baseline purpose of disestablishment." *Rosebud, supra* at 592.[16] Because of the absence of any agreement containing disestablishment language here, there is no such baseline purpose of disestablishment against which to construe the 1908 act. *Rosebud, supra* at 591.

The absence of an agreement also indicates that the Cheyenne River people, unlike the Rosebud people, were given no warning of and certainly did not consent to the application of state law over the affected area—a serious matter at the time. South Dakota law in 1908 (and for many years afterward) expressly prohibited Indians from voting or holding office. Rev. C. S. Dak. (1903), Civ. C. § 26. Jury service was limited to persons qualified to vote, so Indians were excluded from juries. *Id.* Pol. C. § 708. State law at the time even made it a crime for any "person" to "harbor or keep on or about his place of abode within any organized county of the state, any Indian or Indians, who have not adopted the manners and habits

[16]The tribe in *Rosebud* objected to reliance on the 1903 agreement as a voluntary cession since it lacked the requisite extraordinary majority of tribal members' signatures. The Court observed, however, that Congress was aware at the time that it could unilaterally disestablish the affected reservation lands, *Rosebud*, 430 U. S. at 598. The 1903 agreement, then, need not have been an effective cession under the terms of the treaty, but it did show majority consent of the tribe.

of civilized life." *Id.* Pen. C. § 766. Had the 1908 act disestablished the western portion of the reservation, the roughly one-half of the tribal members living on that part of the reservation would have been immediately subjected to the criminal jurisdiction of a hostile government whose juries by law excluded Indian people.[17] Those consequences are all the more reason why the withdrawal of protective federal jurisdiction from an unsuspecting people cannot be lightly inferred. *United States v. Sandoval*, 231 U. S. 28, 40 (1913); *United States v. Kagama*, 118 U. S. 375, 384 (1886):

> These Indian Tribes are the wards of the Nation . . . they owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.

The State understandably ignores the basic difference between the McLaughlin negotiations with the Rosebud Tribe, which produced actual cession agreements, and the hurried discussions with Cheyenne River members which produced nothing at all. With that difference restored,

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[17]The sponsors of the 1908 act described the act to their colleagues as conforming to the Indians' wishes as expressed at the McLaughlin meeting and as consistent with their interest, notwithstanding the absence of an agreement or, in the case of Cheyenne River, any informal response to the proposed opening. *See* State's Br. A-29. At a minimum, Congress should be held to its word in that respect and the 1908 act construed consistently with the Cheyenne River Tribe's reasonable expectation under the circumstances that protective federal jurisdiction would continue. *See* Jones v. Meehan, 175 U. S. 1, 11 (1899); ". . . it must always . . . be borne in mind . . . that the treaty is drawn up by [the United States] and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States."

the other parallels between the two situations are superficial only--that the same person "negotiated" with the two tribes, and the same Senator introduced the two bills. Those two circumstances mean only that the two reservations are in the same state and that Inspector McLaughlin was considered a reliable employee of the Indian service at the time—nothing more.[18] Particularly in light of the serious consequences, the State cannot demonstrate a clear intent to disestablish the opened lands from these insignificant and ambiguous circumstances.

2. The "reservation thus diminished."

Citing *Rosebud*, the State claims to find evidence of intent to disestablish the opened Cheyenne River lands from the proviso in section 2 of the Act referring to the "reservation thus diminished." State's Br. 19-20. Again, the different statutory context of the phrase indicates a different meaning for the phrase here. As the Court of Appeals determined, the term in the 1908 Act referred to the tribes' diminished common land on the reservation, not diminished reservation boundaries. *United States ex rel. Condon v. Erickson*, 478 F. 2d at 687, cited favorably by the Court in *Mattz v. Arnett*, 412 U. S. at 505 n. 23, for its general analysis of the disestablishment issue.

The primary, and we think sole, purpose of the act was to accomplish a real estate sale. The transcript of the McLaughlin meeting, for instance, shows that the individ-

[18]Inspector McLaughlin's visit with 63 members of the Cheyenne River Tribe and his negotiated agreements with the Rosebud Sioux were only two of many meetings of every sort that he had with Indians all over the West. See his autobiography, J. McLaughlin, My Friend the Indian (1910). This book reveals his personal belief that all federal protection should be immediately withdrawn from Indians, but his personal views are not an appropriate basis to construe an Act of Congress.

uals present focused on the amount of land to be sold to homesteaders, which reservation lands were to be opened, the price to be paid for those lands, and how much land would remain for tribal use and allotment. The natural meaning of diminished in that general context is reduced land ownership. *Id.*

Even more so than the term's use by McLaughlin, the phrase "diminished reservation" as used in the congressional committee reports undeniably reflected a proprietary meaning. According to those reports, "The *lands reserved for the use of the Indians upon both reservations is diminished,* in the opinion of your committee and of the Department, are ample and more than sufficient for the present and future needs of the Indians of the respective tribes." State's Br. A-18. (emphasis added.) In that sentence, the adjective diminished is unquestionably used to describe the lands left to the tribe—including mineral and other lands in the opened area—not the reservation boundaries.

The phrase was similarly used in the act to distinguish the land retained by the tribe from that opened for sale to homesteaders. In section two, Congress authorized individual allottees in the area to be opened to exchange their allotment for one within the "reservations thus diminished. . . ."[19] Again, the term referred to retained common

[19]That Congress authorized an individual to exchange his allotment in the opened portion of the reservation for one in the closed portion does not indicate disestablishment of the opened area. Congress presumably realized that some individual tribal members would be disinclined to participate in the Dawes Act social engineering scheme and simply provided that those individuals may relocate. In other words, that provision should be viewed as part of the gradual assimilation plan, in the absence of a baseline purpose of disestablishment. *Rosebud,* 430 U. S. at 613-14. The provision would also please the South Dakota sponsors of the Act by potentially increasing the acreage open to homesteaders.

lands where allotments could be taken and suggests nothing in that context about reservation boundaries or jurisdiction. It is evident, in fact from later usage that the term was commonly understood at the time to mean diminished common land, while the reservation boundaries were unchange. *See, e. g.*, discussion below of Interior records and maps which show the opened area as within the reservation boundaries and also denominate the closed area as the diminished part or portion of the reservation, part II B.

That meaning of "diminished reservation" is further supported by contemporary jurisdictional arrangements. Had a member of Congress paused to reflect on the jurisdictional implications during his consideration of the bill, he would have realized that federal criminal jurisdiction over tribal Indians—the jurisdiction that affect the Indians the most—depended on reservation boundaries rather than land ownership.[20] *See* discussion below, part II B. A member of Congress conscious of jurisdictional issues, then, would not have expected that the "diminishment" of land owned by the tribe would necessarily terminate the reservation status of the affected lands.

3. Liquor amendment.

The State argues that the 1910 liquor amendment to the 1908 Act shows that the reservation status of the opened lands had been terminated in 1908. State's Br. 22-23. This claim will not withstand analysis.

The first problem with the State's argument is shown by the wording of 1910 amendment. It provided (State's Br. A-94-95):

> That the lands allotted, those retained or reserved, and the surplus lands sold, set aside for townsite pur-

[20] At least by 1909, Congress realized that the rule was different for liquor regulation. See discussion below, part B 3.

> poses, or granted to the said States, or otherwise disposed of under the provisions of this act, shall be subject for a period of twenty-five years to the laws of the United States prohibiting the introduction of intoxicants into the Indian country.

By its terms, this provision was not confined to the opened portion of the reservations but applied as well to the parts not opened. The express reference to the lands "retained or reserved" confirms this meaning. Yet the State's argument depends on the contrary proposition.

The 1910 liquor provision for Cheyenne River and Standing Rock was the third in a series of nearly identical provisions applied to most openings and sales of tribal lands from 1909 through 1920.[21] Many of these provisions applied to reservations or parts of reservations long assumed, or actually held by courts, not to be disestablished or reduced by the respective opening statutes. For example, from the prior footnote, see the statute for the Yakima Reservation, compare *Washington v. Yakima Indian Nation*, 439 U. S. 463 (1979) (reservation assumed to exist); the statutes for the Colville Reservation, compare *Seymour v. Superintendent, supra* (reservation held not

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[21]See Act of March 3, 1909, 35 Stat. 795, § 21 (Flathead Res., Mont.); *id.*, § 17 (Ft. Peck Res., Mont.); Act of Feb. 17, 1910, 36 Stat. 196, § 8 (Cheyenne River and Standing Rock); Act of May 6, 1910, 36 Stat. 348, § 11 (Yakima Res., Wash.); Act of May 13, 1910, 36 Stat. 368, § 5 (Siletz Res., Ore.); Act of May 27, 1910, 36 Stat. 440, § 10 (Pine Ridge Res., S. Dak.); Act of May 30, 1910, 36 Stat. 448, § 10 (Rosebud Res., S. Dak.); Act of June 1, 1910, 36 Stat. 455, § 13 (Ft. Berthold Res., N. Dak.); Act of May 11, 1912, 37 Stat. 111, § 2 (Omaha Res., Neb.); Act of July 22, 1912, 37 Stat. 197, § 2 (Colville Res., Wash.); Act of Feb. 14, 1913, 37 Stat. 675, § 8 (Standing Rock Res., N. & S. Dak.); Act of Aug. 31, 1916, 39 Stat. 672, § 13 (Colville Res., Wash.); Act of May 31, 1918, 40 Stat. 592, § 2 (Ft. Hall Res., Ida.); Act of June 30, 1919, 41 Stat. 17, § 10 (Blackfeet Res., Mont.); Act of June 4, 1920, 41 Stat. 751, § 9 (Crow Res., Mont.). Thereafter the practice ended, presumably because liquor had become unconstitutional everywhere in the United States.

disestablished); the statute for the Flathead Reservation, compare *Confederated Salish & Kootenai Tribes v. Namen*, 665 F. 2d 951 (9th Cir. 1982), *cert. denied*, — U. S. —, 74 L. Ed. 291, (reservation held not disestablished) and *Moe v. Confederated Salish and Kootenai Tribes*, 425 U. S. 463 (1976) (reservation assumed to exist); the statute for the Blackfeet Reservation, compare *British-American Oil Producing Co. v. Bd. of Equalization*, 299 U. S. 159 (1936) (reservation assumed to exist); the statute for the Omaha Reservation, compare *Wilson v. Omaha Indian Tribe*, 442 U. S. 653 (1979) (reservation assumed to exist); the statute for the Crow Reservation, compare *Montana v. United States*, 450 U. S. 544 (1981) (reservation assumed to exist); the statute for the Ft. Berthold Reservation, compare *City of New Town v. United States*, 454 F. 2d 121 (8th Cir. 1972) (reservation held not disestablished); the 1913 statute for the eastern part of the Standing Rock Reservation, compare *United States v. Long Elk, supra* (reservation held not disestablished). Admittedly, there are a few cases, such as *Rosebud, supra*, in which the liquor provisions were applied to an area long assumed and held by the courts to have been disestablished.

These statutes were a reaction to the contemporary rule of this Court that Indian country for liquor prohibition purposes was confined to land in original Indian title unless a statute specified otherwise. This rule was announced in *Bates v. Clark*, 95 U. S. 204 (1877). It raised a doubt even about the status of Indian allotments (arguably not in original Indian title) for liquor prohibition purposes. A particular response to the *Bates* rule was a provision in an allotment and opening agreement between the United States and the Nez Perce Indians ratified in 1894. Act of Aug. 15, 1894, 28 Stat. 326. A provision in it applied

the Indian country liquor laws to all lands of the reservation, whether ceded, allotted, or retained by the tribe, for 25 years. 28 Stat. 330 art. 9.

In 1897, Congress resolved the uncertainty over allotments by explicitly applying the liquor laws to allotments. 29 Stat. 506 (1897). In 1908, this Court sustained a conviction for violating the liquor laws on fee patented lands covered by the 1894 Nez Perce statute, *supra*. *Dick v. United States*, 208 U. S. 340 (1908). The Court sustained the special 25 year provision but in dictum renewed the rule of *Bates v. Clark* that jurisdiction otherwise depended on Indian title. *Id.* at 352.[22]

The *Bates v. Clark* rule amid the allotment and opening laws of the period raised the specter that as land went out of trust, it would cease to be subject to the Indian country liquor laws. This would occur within as well as without reservations, by direct sales to homesteaders and by allotees taking their land out of trust. *See* 25 U. S. C. § 349. To meet this threat to the integrity of the liquor laws, the Nez Perce 25 year extension provision was routinely applied after 1909. *See* footnote 21, *supra*. The legislative history of these laws makes clear that they were inspired by the *Dick* decision. *E.g.*, H. R. Doc. No. 711, 61st Cong., 2d Sess. (1910). *See generally*, Cohen, *supra*, at 31-38, 45-46.

That this fear was well founded was confirmed when the Court decided *Clairmont v. United States*, 225 U. S. 551 (1912). Clairmont had been convicted of introducing liquor into the Flathead Reservation in Montana. But he had been arrested on a railroad right-of-way within the reservation. The Court relentlessly applied the rule of

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[22]The jurisdictional rule for general criminal jurisdiction over tribal Indians was quite different. See part II C 2, below.

Bates v. Clark, held that the Indian title to the right-of-way had been extinguished so that it had ceased to be Indian country, and overturned the conviction.[23]

That Congress understood the 1909-1920 liquor provisions in relation to the rule of *Bates v. Clark, supra, Dick v. United States, supra*, and *Clairmont v. United States, supra*, is also shown by the terms of some of the statutes cited in footnote 21, *supra*. The Blackfeet, Ft. Hall, and Crow statutes expressly applied to places described as "within" the respective reservations. Congress knew that the *Bates v. Clark* rule was especially troublesome within reservation boundaries.

The State's contrary argument can be traced to a basic error. It relies on the post-1948 statutory definition of Indian country rather than the Court's contemporary definition in *Clairmont* and other cases. *See* Cohen, *supra*, at 45-46. The use by Congress in any particular case of one of these liquor provisos does not indicate with certainty that it viewed an area as within a reservation or not. But it does show Congress's recognition that the place in question would continue to be a tribal Indian community justifying application of the liquor laws. This is one major attribute of a reservation and is more consistent with continued reservation status than with termination.

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[23]The *Clairmont* Court did not mention the 25 year extension statute applied to the Flathead Reservation in 1909, n. 21, *supra*, although it would not appear to have changed the result. To add to the confusion, the Court sustained a nearly identical conviction in United States v. Soldana, 246 U. S. 530 (1918), on the ground of a technical difference in title to the right of way. These cases probably generated the explicit references to rights of way in 18 U. S. C. § 1151, enacted in 1948. *See* Cohen, *supra*, at 36.

4. School lands provision.

The State argues the provision in the 1908 Act which granted sections sixteen and thirty-six in the opened area to the states for school purposes is evidence of disestablishment. State's Br. 20. As the State points out, school land grants were made in the South Dakota Enabling Act, but were suspended for those sections located on an Indian reservation until the reservation was extinguished. However, the general practice of granting school lands in opening statutes and the specific legislation history of the Cheyenne River Act show that the school lands sections were granted in 1908 sooner than required by the enabling act, not upon termination of the reservation.

The federal statute authorizing the admission of South Dakota into the union also governed the admission of North Dakota, Montana and Washington. Act of February 22, 1889, 25 Stat. 676. Statutes opening Indian reservations in those states often have essentially the same school lands provision as the Cheyenne River Act, but have been held or assumed to have left reservation boundaries intact. *See, e.g.,* Act of June 1, 1910, 36 Stat. 455, opening Fort Berthold in North Dakota, held not to have established the reservation in *City of New Town v. United States, supra;* Act of April 23, 1904, 33 Stat. 302, opening Flathead in Montana, held not to have disestablished the reservation in *Confederated Salish and Kootenai Tribes, etc. v. Namen, supra;* Act of March 1, 1907, 34 Stat. 1035, opening the Blackfeet Reservation of Montana, assumed to exist in *British-American Oil Producing Co. v. Bd. of Equalization, supra;* Act of June 4, 1920, 41 Stat. 751, opening the Crow Reservation in Montana, assumed to exist in *Montana v. United States, supra.* The mere presence of the school lands provision in the Chey-

enne River Act, then, cannot mean that the opened lands were disestablished.

The legislative history of the Cheyenne River Act confirms that the grant was made, as in the other cases, in anticipation of the Enabling Act requirement. For instance, Congressman Sherman explained that sections sixteen and thirty-six were transferred to the states because, "The enabling act of those two states provided that the United States would *eventually* cede such sections to the States, respectively, for school purposes." 42 Cong. Rec. 7003 (1908) (emphasis added). *See also* exchange at 42 Cong. Rec. 7003-07. This suggests that Congress understood the 1908 act as advancing the time by the Enabling Act for the states to acquire the school lands.[24] Congressman Sherman's understanding also avoids the partial redundancy resulting from the State's construction, since the Enabling Act itself guaranteed the school land section to the states upon termination of the reservation. The legislative history of the provision shows it to be as consistent with the overall allotment policy of encouraging assimilation of Indians by exposure to non-Indian society as with an intent to terminate the reservation status of the opened lands. *Mattz v. Arnett*, 412 U. S. at 497; *see also, United States v. Thomas*, 151 U. S. 577 (1894), where the Court held that state school lands were part of a reservation and could coexist with federal jurisdiction over the

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[24]The legislative history of the Rosebud school lands provision was different. The Court concluded in light of that legislative history that the grant was made on the assumption that the reservation had been terminated, not in anticipation of a grant required at some point by the Enabling Act. *Rosebud*, 430 U. S. at 600.

reservation. The school lands provision, as a result, does not support the conclusion made by the State.[25]

In sum, none of the provisions discussed above has ever been held determinative of Congress' intent to disestablish a reservation. Even when the particular circumstances made some of those provisions relevant, they have been cited only as confirming the intent to disestablish found in a cession agreement and its legislative history. *See Rosebud*, 430 U. S. at 613-15; *DeCoteau*, 420 U. S. at 445 n. 33. The State has failed to demonstrate the basic purpose to disestablish in the operative language of the 1908 Act. *See* part A above. As a result, the provisions cited by the State, even were they identical to Rosebud provisions (which they are not), would be insufficient to demonstrate an unmistakable intent to disestablish the opened Cheyenne River lands. *DeCoteau*, 420 U. S. at 445.

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[25]The State also relies on the term "public domain" used in § 9 of the 1908 Act to describe some particular parcels of tribal land to be opened under the Act. The State claims this necessarily implies termination of the lands described and cites a passage in the Court's opinion in Seymour v. Superintendent, 368 U. S. 351, 358 (1962). But the contexts of the two uses of the term was very different, and the term in the 1908 Act does not carry the technical meaning.

In *Seymour*, "public domain" was used in conjunction with the word "vacated" in the operative terms of a statute dealing with an Executive Order Indian reservation. Especially in the executive order reservation context, it was reasonable to give the term its full technical meaning under public land law. But in the 1908 Act it plainly is not so used. The scheme of the Act imports some parts of the public land laws to provide for sale of the opened land. *See* §§ 2, 5. But the Act in other ways sets up its own scheme that differs from the public land laws. *E. g.*, §§ 3, 4, 6. In a different situation, this Court has expressly held that the opened land was not public domain in the technical sense. Ash Sheep Co. v. United States, 252 U. S. 159 (1920). The term in § 9 is but a shorthand reference to the lands available for sale under some of the public land laws; it cannot be made to bear any broader meaning.

Particularly in the absence of an agreement with the Cheyenne River Tribe in which it consented to the application of openly discriminatory state laws to its members, the Court should be reluctant to find intent to disestablish the opened lands by inference or implication. As this Court has observed on numerous occasions, "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are wards of the nation, dependent upon its protection and good faith." *Carpenter v. Shaw*, 280 U. S. 363, 367 (1930). The circumstances here call for strict application of that "eminently sound and vital" canon of construction, *Northern Cheyenne Tribe v. Hollowbreast*, 425 U. S. 649, 655 n. 7, (1976) and a ruling that the opened Cheyenne River lands were not disestablished in 1908.

II. SUBSEQUENT TREATMENT OF THE OPENED PORTION OF THE CHEYENNE RIVER INDIAN RESERVATION CONFIRMS THAT THE 1908 ACT DID NOT TERMINATE THE OPENED AREA.

Subsequent treatment of the area in question by Congress, the Department of Interior, and the courts is significant in determining whether a reservation area has been disestablished. *Rosebud Sioux Tribe v. Kneip*, 430 U. S. at 604-05; *DeCoteau v. District County Court*, 420 U. S. at 442; *Mattz v. Arnett*, 412 U. S. at 505; *Seymour v. Superintendent*, 368 U. S. at 356-57; *United States v. Holliday*, 70 U. S. 407, 419 (1866). Particularly, the Department of Interior's actions in recognizing that the 1908 Act did not reduce the boundaries of the Cheyenne River Indian Reservation should be accorded great weight. *Northern Cheyenne Tribe v. Hollowbreast*, 425 U. S. at 660. Subsequent treatment of the opened part of the Cheyenne River Reservation, while not uniform, has mostly reflected

the assumption that the legislation did not effect the disestablishment of any part of the Reservation.

A. Subsequent Acts of Congress

A year after President Taft proclaimed the opening of the 1908 area, Congress passed the Act of June 23, 1910, 36 Stat. 602, which was entitled:

> An act to authorize the Secretary of the Interior to sell a portion of the unallotted lands *in the Cheyenne River Indian Reservation,* in South Dakota, to the Milwaukee Land Company for townsite purpose. (*emphasis added.*)

The land in question was in the area opened in 1908, and Congress described it as "in" the Reservation. The Act's legislative history also describes the land as "within", "in" or "of" the reservation. S. Rep. No. 723, 61st Cong., 2d Sess. (1910) at 1, 3; H. R. Rep. No. 1046, 61st Cong., 2d Sess. (1910).

Five years after the Act, Congress opened to non-Indian settlement the part of the Standing Rock Reservation not opened by the Act of May 29, 1908. Act of Feb. 14, 1913, 37 Stat. 675. *See United States v. Long Elk,* 565 F. 2d 1032 (8th Cir. 1977). The 1913 Act opened to non-Indian settlement the "*portion* of the Standing Rock Indian Reservation" within an area defined by a lengthy and particular metes and bounds description. Had the 1908 Act altered the Cheyenne River Indian Reservation and the Standing Rock Indian Reservation boundaries, the 1913 Congress would not have described the area to be opened as being a "portion" of the Standing Rock Reservation, since the area affected would have been the entire remaining Standing Rock Reservation. Nor would the detailed metes and bounds description have been necessary.

In 1929, a bill was introduced for the construction of a bridge across "the Moreau River at or near the White Horse Subagency on the Cheyenne River Indian Reservation . . ." H. R. 16660, 70th Cong. 2d Sess. *See* H. R. No. 2539, Feb. 15, 1929 at 1. This district was located partially in the opened portion of the reservation in T. 15 N., R. 26 E.

Under the Acts of September 30, 1950, 64 Stat. 1094, and September 3, 1954, 68 Stat. 1191, Congress authorized a taking of that land on the Cheyenne River Reservation needed to construct the Oahe Reservoir. Under the 1950 act, the Chief of the Army Corps of Engineers was authorized to negotiate for the purchase of lands "located within the taking areas of the respective reservations." 64 Stat. 1094 § 3. Under the 1954 act, Congress acquired lands necessary for construction of the Reservoir "within said Cheyenne River Indian Reservation." 68 Stat. 1191 § 1. The lands taken for the Oahe Reservoir included lands in the portion of the reservation opened by the Act of May 29, 1908. *E. g.*, 68 Stat. at 1209-16 (all land in townships 16 and 17 north is in the opened area.)

Pursuant to the act of October 17, 1975, 89 Stat. 577, federal "submarginal lands" were declared to be held in trust by the United States for a number of Indian tribes, including the Cheyenne River Sioux. Some of the lands were located within the opened portion of the Cheyenne River Reservation. Congress considered the submarginal lands in the 1908 area that were transferred to the Cheyenne River Sioux Tribe to be within the exterior boundaries of the Reservation. *See* letter of April 23, 1975, from Assistant Interior Secretary Royston Hughes to Senator Henry M. Jackson quoted in S. Rep. No. 94-377, 94th Cong., 1st Sess. at 29 (1975).

Admittedly, the subsequent legislative record is not uniformly favorable to our position. As amici counties

point out, in 1922 a statute was passed to extend (for the fourth or fifth time) the deadline for payment by homesteaders to the tribe for lands opened in 1908, and the statute used the term "former Cheyenne River and Standing Rock Indian Reservations." 42 Stat. 499 (1922). *See* Amici Counties' Br. 37. The same term was repeated in three later amendments to the 1922 act further extending the time for payment. 43 Stat. 1184 (1925); 45 Stat. 400 (1928); 46 Stat. 1107 (1931). But a payment extension statute only a year earlier had referred to "lands in the Cheyenne River Indian Reservation." 41 Stat. 1447 (1921) § 2. Also, the Interior Department orders carrying out the extensions in both years referred to the lands as "in the part of the Cheyenne River" Reservation opened by the 1908 Act. 48 Interior Dec. 80 (1921); 49 Interior Dec. 131 (1922). As the Court has recognized, such references are "not to be read as a clear indication of congressional purpose to terminate." *Mattz v. Arnett, supra,* 412 U.S. at 498. In *Mattz,* the Court was dealing with an analogous term in the opening statute itself. Here the term appears many years later.

In sum, Acts of Congress after 1908 have often indicated that the 1908 Act was not understood to deprive the encompassed area of its reservation status.

B. Subsequent Executive Branch Actions

The Presidential Proclamation officially opening the lands in 1909 described the lands to be opened as "all the nonmineral, unallotted, unreserved land within the Cheyenne River and Standing Rock Indian Reservations." Proclamation of August 19, 1909, 36 Stat. 2500. On August 21, 1909, regulations were approved by the Acting Secretary of the Interior for the opening of the Cheyenne River Reservation:

> Pursuant to the Proclamation of the President issued August 19, 1909, for the opening of the classified lands within the Cheyenne River and Standing Rock Indian reservations, the following rules and regulations are hereby prescribed. . . . 38 Interior Dec. 160 (1909).

Shortly thereafter on February 7, 1910, the Secretary of Interior wrote to President Taft:

> . . . (I)t is respectfully recommended that the date on which the Cheyenne River and Standing Rock lands are to become subject to entry under the proclamation of August 29, 1909, be extended from April 1, 1910, to May 1, 1910. . . . 40 Interior Dec. 56 (1910).

President Taft approved the recommendation the next day. Apparently both the President and the Secretary still regarded the opened lands as "Cheyenne River . . . lands" regardless of the 1908 Act.[26]

Various letters written by officials of the Bureau of Indian Affairs from 1909 to 1911 referred to the reservation lands opened for settlement as being "within the Cheyenne River Indian Reservation." Letters of January 11, 1911, from the Secretary of the Interior to Secretary of Treasury; July 29, 1910, from Acting Commissioner of Indian Affairs to Secretary of Interior; and December 14, 1909, from Chief Clerk of Bureau of Indian Affairs to P. J. Moulton. National Archives, Record Group No. 75, Central Files 1907-1939, Bureau of Indian Affairs, 58752-1410-308 and 94744-1909-305, Cheyenne River.[27]

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[26]The notice of publication required by Interior to be published in order to establish title to the lands homesteaded within the 1908 area regularly after 1908 referred to the lands as "Cheyenne River Indian lands." *See*, for example, Timber Lake Tribune, Volume 2, Number 8, July 20, 1911; Volume 2, Number 11, August 10, 1911.

[27]There can be no doubt that the non-Indians who settled in the 1908 opened portion of the reservation considered the

(Continued on next page)

In 1912, after the reservation had been opened for non-Indian settlement, Superintendent King called for the relocation of agency headquarters to the center of the reservation at Eagle Butte, South Dakota. He wrote: "Agency headquarters . . . should be moved to Eagle Butte which is a railroad point situated at about the geographical center of the reservation." 1912 Annual Report of BIA Superintendent, Hoxie Rep., *supra* n. 1, App. 64.

This proposal remained the subject of discussion for years. Charles Burke, while Commissioner of Indian Affairs, supported the reasoning in a letter:

> I don't mind saying that for administrative reasons and in the interests of economy, and close and better supervision of the Indians, there should be an administrative office at some point near the center of the

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(Continued from previous page)

area to be an Indian reservation. The Timber Lake Tribune, published at Timber Lake in the opened portion, repeatedly and continuously reflected the understanding of the residents of the opened portion that they were living on an Indian reservation. For example, there was a fight over whether the federal land office should be in Timber Lake or elsewhere. The Tribune stated that "no other town on the reservation, as far as we know, is bidding for the land office." Timber Lake Tribune, Volume 1, Number 18, September 22, 1910 (State of South Dakota Historical Resource Center, Pierre, South Dakota). A campaign "to bring the office to the reservation, where it belongs" was advertised. Volume 1, Number 17, September 29, 1910. Dewey County was publicly acknowledged to comprise the "Cheyenne River Indian Reservation." Volume 1, Number 44, April 6, 1911. Timber Lake, the Tribune claimed, was "destined to be the best town on the reservation". Volume 1, Number 44, April 6, 1911. Readers of the Tribune wrote letters to the editor evidencing their belief that in settling on the land in the open area they were residing on an Indian reservation, Volume 2, Number 9, July 27, 1911; Volume 2, Number 11, August 10, 1911. News reports of activity at Timber Lake Land Office and of Timber Lake's first anniversary leave no doubt that the opened portion of the Cheyenne River Indian Reservation was considered to be on the reservation. Volume 1, Number 51, May 18, 1911.

> reservation . . . . It is 155 miles from the agency to the farthest boundaries of the reservation . . . .

Hoxie Report at 95. Eagle Butte is indeed at the center of the Reservation in Township 12, Range 24 in the opened portion of the Reservation.

Other documents show that after 1908 the Cheyenne River Reservation continued to be administered by the BIA and the Tribe based on its 1889 boundaries. For example the four administrative districts of the reservation included the Thunder Butte District "of this reservation," a district entirely in the opened area. Hoxie Rep. App. 16 (letter of Mar. 5, 1913); Hoxie Rep. App. 31 (1928 letter referring to federal Indian school at Thunder Butte); Hoxie Rep. App. 41 (1913 letter referring to a "General Council of the Indians of this reservation held at the Thunder Butte (Sub-station.)" *See also* Hoxie Rep. App. 13 (map showing Thunder Butte District). The 1912 Annual Report of the BIA Superintendent, Hoxie Rep. App. 64, described the Reservation as "4,300 square miles" (the full 1889 Reservation) and again referring to the Thunder Butte Station.

Other documents addressed law enforcement in the opened portion. A 1911 BIA report ordered the Indian police of each district (including Thunder Butte) to go to the four towns of Timber Lake, Isabel, Eagle Butte, and Dupree to cover potential problems on the 4th of July. Hoxie Rep. App. 66 (Letter of June 30, 1911, referring to July 4th celebration). All four towns are in the opened area. *See also* Hoxie Rep. pages 100-34.

Amici counties have lodged copies of assorted documents in support of their claim that the opened part had been terminated. *See* Amici Counties' Br. 42 n. 13. But these documents include frequent references to the two parts of the reservation that show the understanding that

the reservation comprises both. For example, the 1911 Annual Report of the Superintendent, supplied as Counties' Appendix doc. no. 12, states (at Section I, page 1):

> The opening of the reservation has increased rather than diminished the necessity for Indian police in both open and diminished parts of the reservation.

Numerous other references to the two "portions" or "parts" of the reservation are in the documents. *See e. g.*, 1914 Annual Report of the Supt. at 13, Counties' Appendix doc. no. 30. Typically these references describe the unopened part as the "diminished portion" or "diminished part of the Reservation." This supports our view that the word "diminished" in the 1908 Act meant diminished in land owned by the Tribe, not in reservation jurisdiction. *See* part I B 2 above.

The Secretary of the Interior in 1935 approved the Cheyenne River Sioux Tribe's Constitution pursuant to the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U. S. C. § 476. The tribe adopted its Constitution and Bylaws at a Secretarial Election conducted pursuant to § 476. The approved Constitution and Bylaws provide that:

> The jurisdiction of the Cheyenne River Reservation Sioux Tribe of Indians shall extend to the territory within the original confines of the diminished reservation boundaries, which are described by the Act of March 2, 1889 (25 Stat. L. 888).

Constitution and Bylaws of the Cheyenne River Sioux Tribe of Indians, Article I. In approving the Constitution's definition of tribal jurisdiction over the reservation boundaries established by the 1889 legislation, the Secretary of the Interior recognized that the exterior boundaries of the Cheyenne River Indian Reservation were not reduced by the 1908 Act. Consistently and regularly from

1908 to the present time, the Cheyenne River Sioux Tribal Court, unlike the tribal officials in *Rosebud Sioux Tribe v. Kneip, supra, and DeCoteau v. District County Court, supra,* has exercised jurisdiction over its members in the 1908 area.

During the 1950's the Secretary again acted in a manner which indicated the belief that the opened area remained part of the reservation. Under the Act of Sept. 3, 1954, 68 Stat. 1191, the Secretary carried out the recommendation first made in 1912 and moved the BIA Agency headquarters to Eagle Butte in the opened area. The governing Treaty and statutes required that the tribe's federal agent "reside among them," and "reside within the Reservation." Treaty of June 29, 1868, 15 Stat. 635, art. 5; Act of February 28, 1877, 19 Stat. 254 § 7. There is no indication that the Secretary in 1954 intended to violate the treaty or statute by moving the agency off the reservation.

Amici counties argue that the 1941-1967 orders of the Secretary of the Interior restoring unsold land from the 1908 opening to the Cheyenne River Sioux Tribe were based on the assumption that the 1908 Act terminated the opened area. *See* Amici Counties' Br. at 46. The argument principally depends on the Secretary's reliance in these orders on § 7 of the Indian Reorganization Act (IRA), 25 U. S. C. § 467. This section authorizes the Secretary to add "to existing reservations" lands placed in trust for tribes under other sections of the IRA. The argument is that reliance on this section would be unnecessary if the lands were already within an existing reservation.

This argument is misplaced. Every order the Secretary has made under the IRA to restore unsold lands to any tribe has relied on both sections 3 and 7 of the

IRA. *See* 7 C. Kappler, Indian Affairs, Laws and Treaties, 1399-1601 (GPO), setting out all departmental orders between 1936-1971, many of which are IRA restorations. No such order involves any decision by the Secretary on whether any opening statute did or did not terminate the reservation status of the area opened. As the many court decisions of recent years show, any such determination by the Secretary would have been risky. Rather, the Secretary routinely included the § 7 designation in every order out of an abundance of caution.[28]

The wording of the particular restoration orders for Cheyenne River is consistent with continuing reservation status of the opened area. The orders, like the Interior Department's general nomenclature for years before (discussed above), referred to the "opened" or "ceded portion" of the Cheyenne River Reservation. *E. g.*, Order of Restoration of June 12, 1941, 6 Fed. Reg. 3300, 7 Kappler 1438.

Amici counties argue that official maps show the disestablishment of the opened portion of the Cheyenne River Indian Reservation. *See* Amici Counties' Br. 47. This is incorrect. Three of the large-scale maps they have lodged with the Court set out the original boundaries of the reservation, and the entire area is clearly stated to be the Cheyenne River Indian Reservation.

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[28] In statutes restoring land, Congress used similar terms. For example, the Act of May 19, 1958, 72 Stat. 121, restored land to the Klamath River Reservation, in California, and said that the lands restored "are hereby added to and made a part of the existing reservation for such tribe or tribes." Later, this Court held that that reservation had not been terminated. Mattz v. Arnett, *supra*.

C. Subsequent Court Actions

The State claims that since 1908, state courts have consistently asserted jurisdiction over the opened portion of the Cheyenne River Reservation and the federal courts have acquiesced in state jurisdiction. State's Br. 53-59. This claim will not withstand analysis.

Initially, it is remarkable that this claim is made despite the absence of *any* reported case in which an Indian was prosecuted by the State prior to 1963. *See* State's Br. 54. Also, occasional state prosecutions for offenses occurring on the opened lands proves little if anything about Cheyenne River Reservation boundaries, since the State claimed jurisdiction concurrent with the federal courts over all Indian reservations for much of the relevant period. *See* part C 1 below. The history of federal jurisdiction, though not consistent, tends to support the continued reservation status for the opened lands. Only the tribal court, which has historically defined its jurisdiction over tribal members by the reservation boundaries, has consistently exercised jurisdiction over the opened lands since 1908 on the assumption that the reservation boundaries had not been altered. As a result, the jurisdictional history of the opened lands strongly supports reservation status of those lands. *DeCoteau*, 420 U. S. at 442-43.

1. State courts

As discussed further below (at pages 43-45), in 1901 the State passed a statute giving the United States jurisdiction over any "person committing seven named crimes "upon" any Indian reservation in the State. Sess. Laws S. D. 1901 c. 106; Rev. C. S. D. (1903), Pol. C. § 8. In

1929, the South Dakota Legislature amended the 1901 statute by adding the following:

> ". . . But whenever any of said acts committed by any person upon an Indian reservation within this state shall constitute a crime under any law of the state of South Dakota, concurrent jurisdiction is hereby expressly reserved to the State of South Dakota to arrest, prosecute, convict and punish any person committing any offense under the Laws of the State of South Dakota even though the acts constituting such offense may also constitute an offense under the laws of the United States of America."

Ch. 158, Session Laws of South Dakota, 1929.[29] This assertion of concurrent jurisdiction remains in force, now found at S. D. Codified Laws, § 23A-16-1 (1979). *See State v. Shoemaker*, 39 N. W. 2d 524 (S. D. 1949).[30] Simply stated, South Dakota has claimed concurrent criminal jurisdiction over crimes committed by any person upon an Indian reservation since 1929. That the State may at times have prosecuted Indians for crimes occurring on any part of the reservation says nothing, then, about reservation boundaries.

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[29]In 1940, the South Dakota Attorney General expressed the view that the 1929 amendment was not valid. *See* Biennial Report of the Attorney General 1939/1940, p. 505. The 1929 statute was nonetheless re-enacted three times after the issuance of that opinion. *See* S.L. 1951, Ch. 187; SDCL, 1967 23-9-6; SL 1978, Ch. 178, § 220.

[30]Section 23A-16-1 reads in full: "Whenever any acts in violation of the penal laws of the United States committed by any person upon any Indian reservation within this state shall constitute a crime under any law of the state of South Dakota, concurrent jurisdiction is hereby expressly reserved to the state of South Dakota to arrest, prosecute, convict and punish any person committing any offense under the laws of the state of South Dakota, even though the acts constituting such offense may also constitute any offense under the laws of the United States."

2. Federal courts

There have been at least two prosecutions in federal court which indicate an assumption on the part of the federal court and prosecutor that the opened lands remained part of Cheyenne River Reservation. In 1926, one "James Mound. Indian" was successfully prosecuted in federal court in South Dakota for larceny "on Cheyenne River Indian Reservation." The Superintendent's report to the area office on the offense shows the locus of the crime as within the opened portion of the reservation.[31] A second larceny was committed by Pete Useful Heart in 1933 on the Cheyenne River Reservation. The report of this case says that Useful Heart stole a horse from the Chappell Bros. Co. land and sold it to Ward Phlegly on sec. 17, T. 16, R. 29. The latter location is in the opened area. At the time the Chappel Bros. Co. leased lands in both the opened and closed portion of the reservation. 1930 Grazing Report, 63145-1930-Cheyenne River File No. 301, National Archives. The failure of the case report to specify which leased lands indicates that the locus (*i. e.*, on the opened or closed portion of the reservation) was not thought relevant for federal jurisdiction.

The exercise of federal court jurisdiction over the opened Cheyenne River lands was not consistent, however. In *United States v. La Plant*, 200 F. 92 (D. S. D. 1911), a non-Indian was indicted for homicide of a non-Indian victim occurring on lands within the Cheyenne River

[31]The Superintendent's report stated that the crime occurred in Sec. 29, T. 16 R. 28 W., Dewey County, and did not apparently consider it necessary to state whether the offense occurred on the opened or closed portion of the reservation. See Appendix 96 of the Hoxie Report, *supra* n. 1, found in Volume VII of the record transmitted from the Court of Appeals. The cited section is within the opened part of the reservation, as maps lodged with the Court show.

Reservation to which a fee patent had been granted under the 1908 Act. The district court dismissed the indictment for want of federal jurisdiction, concluding that federal jurisdiction had lapsed when the Indian title to the land where the offense occurred had been extinguished. *Id.* at 93. However, a careful examination of the governing laws and decisions of this Court shows that the *La Plant* court applied the wrong legal standard, an error which undermines its application to the instant controversy.

The principal statute then governing criminal jurisdiction over Indian defendants on reservations was the Indian Major Crimes Act, 23 Stat. 385 § 9 (1885). It applied "within the limits of any Indian reservation," and the words "Indian country" did not appear in the statute. This raised the question whether it was subject to the rule of *Bates v. Clark, supra* page 24, that federal jurisdiction lapsed as Indian title was extinguished. In *United States v. Thomas,* 151 U.S. 577 (1894), the Court sustained federal jurisdiction over homicide by an Indian occurring on state school land within a reservation, land to which the Indian title had been extinguished. In other words, this law looked to reservation boundaries, not to Indian title, for its application.

The Indian Major Crimes Act applied only to Indian defendants. There was normally no federal jurisdiction over non-Indians committing crimes against non-Indians on Indian reservations. *United States v. McBratney,* 104 U.S. 621 (1882). *La Plant* would normally have been a state court case regardless of reservation boundaries.

But peculiar laws were then in force in South Dakota. In 1901, the State adopted a statute giving the United States jurisdiction over any "person" committing one of

the seven crimes then listed in the Indian Major Crimes Act if committed "upon" an Indian reservation in the State. Sess. Laws S. D. 1901 c. 106; Rev. C. S. D. (1903), Pol. C. § 8. In 1903, Congress asserted federal jurisdiction over these seven crimes "within the limits" of any Indian reservation in South Dakota. 32 Stat. 793 (1903) (repealed 1948).

Because the 1903 federal act used the same term of place as the Indian Major Crimes Act, the same scope of application might have been expected, relying on *United States v. Thomas, supra.* But the Eighth Circuit in a dictum ignored *Thomas* and applied the title-bound rule of *Bates v. Clark* to the 1903 Act. In *Hollister v. United States,* 145 F. 773, 777 (8th Cir. 1906), the court said:

> The Act of February 23, 1903 [32 Stat. 793], ex vi termini, became inoperative so far as any particular reservation was concerned upon the extinguishment of the Indian title. *Bates v. Clark,* 95 U. S. 204, 208. . . .

Hollister also involved an offense by a non-Indian against a non-Indian.

In 1909, this Court reconfirmed that the Indian Major Crimes Act depended on reservation boundaries and not on Indian title. *United States v. Celestine,* 215 U. S. 278, 285 (1909), was a prosecution of an Indian for homicide, and the Court said:

> But the word "reservation" has a different meaning, for while the body of land described in the section quoted as "Indian country" was a reservation, yet a reservation is not necessarily "Indian country" . . . when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress.[32]

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[32]Compare the discussion of the Indian country liquor laws above at pages 22-26.

These were the relevant precedents in 1911 when *La Plant* was decided. But the *La Plant* court took no notice of this Court's decisions in *Thomas* and *Celestine*. It relied entirely on the contrary dictum of the Eighth Circuit in *Hollister*, quoting verbatim the passage from *Hollister* set out above. 200 F. at 93. The court construed the phrase "thus diminished" in the 1908 Act to mean diminished by the extinguishment of Indian title. *Id.* at 94. (This is further evidence that the contemporary understanding of that phrase was in terms of tribal title, not boundaries; see pages 20-22 above.) The entire discussion was in title terms, and jurisdiction was denied based on extinguishment of title to the parcel at issue.[33]

The fact that *La Plant* and *Hollister* did not involve Indians makes them peculiar cases. Federal Indian jurisdiction within the States has generally been tied to matters directly affecting Indians, and this Court has at times construed laws to restrict federal jurisdiction over Indian reservations when only non-Indians were involved. For example, in *United States v. McBratney, supra*, the Court held, notwithstanding the apparently plain language of a statute granting jurisdiction, that there was no federal jurisdiction over a reservation crime involving only non-Indians. *See also Draper v. United States*, 164 U.S. 240 (1896). Similarly, the Court has restricted tribal jurisdiction over non-Indians on reservations. *Montana v. United States, supra; Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978). The very restrictive interpretation of federal jurisdiction in *La Plant* and *Hollister* thus fits a traditional pattern of decision in cases where Indians are not directly involved.

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[33] *La Plant* was followed without analysis to sustain the conviction of another non-Indian defendant accused of homicide on Cheyenne River land fee patented under the 1908 Act. State v. Sauter, 48 S. D. 409, 205 N. W. 25, 28 (1925).

3. Tribal courts

In contrast to the ambiguous record of state and federal jurisdiction over the opened lands, the history of tribal jurisdiction is clear and consistent. The geographic extent of tribal authority to govern its members is generally defined by reference to reservation boundaries, not tied to land owned by the tribe.[34] The Cheyenne River Tribe has consistently exercised that authority over its members on the opened portion of the reservation from 1908 to the present time.

In 1911, The Cheyenne River Agency Superintendent summarized tribal court and police activity on the reservation in response to an inquiry from the Commissioner's office. At that time, there were five police officers, 18 police privates, and four tribal judges.

> The police are expected to cover the entire reservation, both the diminished portion and the portion thrown open to settlement. . . . The reservation is not divided into police jurisdictions; instead, there are four districts, namely, Agency, White Horse, Thunder Butte and Cherry Creek. [Thunder Butte was in the opened part of the reservation]. The Agency District has six police privates and one officer; White Horse and Thunder Butte and Cherry Creek Districts each have four privates and one officer, and there is one police officer at large having charge of all the police work. . . . Four courts of Indian offenses are maintained—one at the Agency and one at each of the three subagencies, each court being presided over by an Indian judge. Approximately 600 cases are tried during the

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[34]See Buster v. Wright, 135 F. 947, 951-52 (8th Cir. 1905), *appeal dismissed*, 203 U. S. 599 (1906); W. Hagen, Indian Police and Judges (1966). *See also* 25 C. F. R. § 11.2(a) (1983), defining the jurisdiction of Courts of Indian Offenses. This provision is unchanged since its original adoption in 1935.

> year, in which number probably 400 convictions are returned. The sentences rendered impose fines ranging from $5.00 to $25.00 and imprisonment in the Agency or sub-agency guardhouse for some 30 to 90 days.[35]

The record in the *Dupris* case shows that the same tribal court system prevailed well into the 1920's with the explicit approval of the Indian Department. *See* Hoxie Report, *supra* n. 1, Chap. V.

After the passage of the Indian Reorganization Act of 1934, 48 Stat. 984 (codified at 25 U. S. C. § 476), the Cheyenne River Tribe revamped its tribal government, including its Courts system. The Code of Offenses of the Cheyenne River Sioux Tribal Court, adopted by the tribe on October 6, 1937 and approved by the Bureau of Indian Affairs Agency Superintendent on October 8, 1937, provided in pertinent part:

> The Cheyenne River Sioux Tribal Court of the Cheyenne River Indian Reservation shall have jurisdiction over all offenses when committed by any member of the Cheyenne River Sioux Tribe on the reservation and any person consenting to jurisdiction as hereinafter provided. . . .
>
> The Cheyenne River Reservation shall be taken to include all territory within the original reservation boundaries. . . .

Exhibit 1, attached to testimony of Cheyenne River Sioux Tribe at Hearing before a Subcommittee on Indian Affairs, United States Senate, 76th Cong., 2d Sess., pt. 37,

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[35]Thomas J. King to Commissioner, Aug. 25, 1911, Response to Circular # 554, National Archives Record Group 75, Appendix 76 to Hoxie Report, *supra* n. 1, Vol. VI of the record herein transmitted from the Court of Appeals.

pp. 21619-23 (1939). All subsequent amendments of the tribal laws are consistent.

The only clear pattern, then, that emerges from the jurisdictional history of the opened Cheyenne River lands is the consistent exercise of tribal court jurisdiction over those lands. Because the Cheyenne River Tribe has always defined its court's jurisdiction by reference to the reservation boundaries, the jurisdictional history of that court reflects the tribe's understanding that the reservation boundaries were not altered in 1908. That the Indian Department consistently approved of the tribal court's activity shows that it viewed tribal regulation of internal matters over those lands—a fundamental attribute of an Indian reservation—as appropriate. *See United States v. Wheeler*, 434 U. S. 313, 322-26 (1978); *Fisher v. District Court*, 424 U. S. 382 (1976). Particularly when compared with the ambiguous state authority asserted over the opened lands, the longstanding history of tribal court jurisdiction has created justifiable expectations among the Cheyenne River people that the tribe's inherent authority to regulate internal concerns extends to those lands. *Cf. Rosebud*, 430 U. S. at 605-06.

CONCLUSION

For the reasons stated, the Court should affirm the judgment of the Court of Appeals and sustain the District Court's grant of a writ of habeas corpus to John Bartlett.

Respectfully submitted,

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NO. 82-1253

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HERMAN S. SOLEM, WARDEN
SOUTH DAKOTA STATE PENITENTIARY;
and
MARK V. MEIERHENRY, ATTORNEY GENERAL,
STATE OF SOUTH DAKOTA,

Petitioners,

v.

JOHN BARTLETT,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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NO. 82-1253

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HERMAN S. SOLEM, WARDEN
SOUTH DAKOTA STATE PENITENTIARY;
and
MARK V. MEIERHENRY, ATTORNEY GENERAL,
STATE OF SOUTH DAKOTA,

Petitioners,

v.

JOHN BARTLETT,

Respondent.

ARGUMENTS AND AUTHORITIES

THE STATE OF SOUTH DAKOTA HAS JURISDICTION OVER CRIMES COMMITTED ON UNALLOTTED LAND OWNED BY NON-INDIANS IN THE AREA OF THE ORIGINAL CHEYENNE RIVER RESERVATION OPENED BY THE 1908 SURPLUS LANDS ACT.

I. Neither the Nature of the Land and the People Within the Area Affected by the 1908 Act nor the Effect a Decision will have on the Tribe and State Supports a Finding of Continued Reservation Status.

A. The acreage and population figures for the area in question support a finding of diminishment.

The Act of May 29, 1908, 35 Stat. 460, was implemented by the opening of surplus lands to settlement on May 1, 1910. 40 Interior Dec. 56 (1910); Presidential Proclamation of August 19, 1909, 36 Stat. 2500. Of the roughly 1.6 million acres comprising the portion of the original Cheyenne River Reservation effected by the 1908 Act, some 520,000 acres were allotted to Indians by 1925. An additional 14,000 acres were reserved for agency, school, and mission purposes. Nearly 1.1 million acres was available for disposal to non-Indians. Of the nearly 1.1 million acres available for disposal to the State and non-Indian settlers, over 917,000 acres, or 85 percent, was finally disposed of, as detailed below.

By 1925, some 93,000 acres of this land had been granted to the state, 1,000 acres had been set aside for townsites, 192,000 acres had been sold directly, and 765,000 acres had been entered by homesteaders. Only 28,000 acres remained vacant and unentered. Sioux Tribe of Indians v. United States, 105 Ct.Cl. 725, 752, vacated on other grounds, 329 U.S. 685 (1946), judgment re-entered, 78 F. Supp. 793, 112 Ct.Cl. 50 (1948), cert. denied, 337 U.S. 908 (1949).

After 1925, the number of acres of vacant land increased, presumably through the inability of some settlers to perfect their homestead entries. Following the passage of the Indian Reorganization Act in 1934, 25 U.S.C. §§ 461 et seq., some 161,000 acres of unsold lands were restored to tribal ownership and reservation status by the Secretary

of Interior.[1] H.R. Rep. No. 2503, 82nd Cong., 1st Sess. at 65 (1952). There are virtually no remaining unrestored surplus lands.

The speculative assertions of the United States that "relatively few entries were perfected" and "the Tribe's title to most of the opened land survived," are thus incorrect. Br. U.S. 26, 27 n. 31. The affected area today contains a substantial non-Indian population and a substantial proportion of non-Indian owned lands.[2] It also includes

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[1] Nearly all of this acreage was restored in 1941, 1949, and 1952. See, 6 Fed. Reg. 3300; 14 Fed. Reg. 471; 17 Fed. Reg. 1065. The subsequent restorations involved less than 300 acres, all in townsite lots. See, 22 Fed. Reg. 3693; 30 Fed. Reg. 15588; 32 Fed. Reg. 14276.

[2] The population of the area in question is about half Indian and half non-Indian. Br. Respondent 4; Br. Cheyenne River Sioux Tribe 22. However, the population of the Town of Eagle Butte is only 46.4 percent Indian.

the county seats of both Dewey and Ziebach Counties.

B. The effect of a decision in this matter on the Tribe and the State.

The State questions neither the Indian country status of tribal land restored

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U.S. Department of Commerce, 1980 Census of Population and Housing - Advance Reports: South Dakota 8 (1981). The racial makeup of the affected area stands in contrast to that of the unaffected area, which is about 84 percent Indian. U.S. Department of Commerce, 1980 Census of Population, v. 1, ch. B, "General Characteristics," pt. 43 at 132, 140 (1982). Furthermore, the population in the area affected by the 1908 Act in the original Standing Rock Reservation is about 75 percent non-Indian, with comparable figures with respect to the land.

Precise figures as to the proportional land ownership of Indians and non-Indians are unavailable. However, the assertion that "almost half" of the area is Indian-owned is exaggerated. See, Br. U.S. at 27 n.31. Today, about two-thirds of the land affected by the 1908 Act is owned by non-Indians. See, U.S. Department of Interior, Land Ownership Maps of Cheyenne River Reservation, Segments A-G, K-R, X-Z, AA-CC, EE (available at Aberdeen Area Office, Aberdeen, South Dakota).

to reservation status by the Secretary of the Interior since 1934, nor the Indian country status of allotments still held in trust for individual Indians. Regardless of the outcome of this case, these lands, where most of the tribal population resides, will remain within tribal and federal jurisdiction. See, DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975). This jurisdictional dispute therefore principally concerns non-Indian lands within the opened area.

1. The effect on the Tribe is relatively small.

Because the Indian population in the area is concentrated on Indian lands, the effect on the Cheyenne River Sioux Tribe of a decision in favor of the State will be relatively small. The Tribe and the federal government would continue to have governmental authority over tribal members on Indian lands, and the State would generally

lack such jurisdiction. Such a decision would by no means produce the "parade of horribles" imagined by the Tribes.

The Tribes have suggested that a finding of diminished reservation boundaries will result in the sudden placement of unsuspecting Indians within an alien jurisdiction. Br. Cheyenne River Sioux Tribe 22-23, 24-25. This suggestion is not founded in the jurisdictional realities of the situation. First, the jurisdiction of the State would extend only to Indians outside the considerable portion of the affected area conceded to be Indian country. Second, the State had continuously exercised jurisdiction over the opened lands for over sixty years, until the decision in United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973). United States v. Dupris, 612 F.2d 319, 338-39 (8th Cir. 1979) (McMillian, J., dissenting), vacated, 446 U.S. 980 (1980). This exercise

was based on explicit holdings of diminishment and included crimes involving Indian defendants and Indian victims. See Lafferty ex rel. State v. Jameson, 80 S.D. 411, 125 N.W.2d 171 (1963); State v. Sauter, 48 S.D. 409, 205 N.W. 25 (1925).

Additionally, the state system of jurisprudence cannot be characterized as foreign to tribal culture, because the Tribe has for many years operated a Court based on the Anglo-American model. See, Code of Offenses, Cheyenne River Sioux Tribal Court. The tribal members have also always been subject to the jurisdiction of the federal courts for "major crimes" within Indian country. See, 18 U.S.C. § 1153. Furthermore, state law is specifically made applicable to tribal members in certain instances. See, 18 U.S.C. § 1152; 18 U.S.C. § 13. Finally, tribal members, like all other citizens of the state, participate fully in its political

process. See, Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 615-16 n.48 (1977).

2. The decision in the matter poses serious consequences to the State.

While the State recognizes the special position of Indians and Indian reservations under federal law, the State also has a legitimate concern that the uniform application of its laws not be unduly disrupted by conflicting authority in areas which, by congressional enactment, were settled by non-Indians in the same manner as nearly all other regions in the state, which have consequently attained a strongly non-Indian character, and which have not been regarded as reservation territory for several decades. If the area is declared to be part of the existing reservation, then neither the Tribe nor the State will have jurisdiction over non-Indians committing crimes against Indians

or Indian property. Such persons are instead subject only to federal prosecution. See, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); Williams v. United States, 327 U.S. 711 (1946). Hence, for this class of offenses, local residents would have to rely on federal law enforcement officials and distant offices of United States Attorneys, rather than local authorities, to bring offenders to justice. Because federal officials frequently have more pressing demands on their time and resources, many such crimes may go unpunished if the area is determined to have reservation status.

Additionally, although the Tribes attempt to play down the degree of tribal civil and regulatory authority over non-Indians or land owned by non-Indians within the Reservation, this is an important consideration. The standards announced in Montana

v. United States, 450 U.S. 544, 565-66 (1981), have been read to permit a wide range of tribal regulation and taxation of non-Indians on non-Indian lands.[3]

Non-Indians must also resort to tribal courts rather than state courts to litigate claims against Indians arising on non-Indian lands within reservation boundaries. See, Williams v. Lee, 358 U.S. 217 (1959); Kain v. Wilson, 83 S.D. 482, 161 N.W.2d 704 (1968). Because non-Indians cannot participate in the tribal political process, and recourse for violation of their rights is strictly limited,

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[3] See, Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982), cert. denied, 103 S.Ct. 293 (1983) (building, health, and safety regulations); Knight v. Shoshone and Arapahoe Indian Tribes, 670 F.2d 900 (10th Cir. 1982) (zoning regulations); Snow v. Quinault Indian Nation, 709 F.2d 1319 (9th Cir. 1983) (licensing and taxation). The Cheyenne River Sioux Tribe is no exception. It has in the past, and continues to assert, in varying degress, civil and criminal jurisdiction over non-Indians, especially in the area in question.

there exists a serious potential for discriminatory exercise of tribal authority. See generally, Dry Creek Lodge v. Araphoe and Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980), cert. denied, 449 U.S. 1118 (1981); Schantz v. White Lightning, 502 F.2d 67 (8th Cir. 1974).

II. The Intent of the 1908 Surplus Lands Act was to Diminish the Boundaries of the Original Cheyenne River Reservation.

A. The face of the Act demonstrates an intent to diminish.

1. "Sell and Dispose"

Bartlett notes the superficial similarities between the "sell and dispose" language in section 1 of the Act and the language used in the statutes construed in Mattz v. Arnett, 412 U.S. 481 (1973), and Seymour v. Superintendent, 368 U.S. 351 (1962). He fails, however, to note the identity of language in the 1908 Act and the 1907 and 1910 Rosebud Acts, which were construed more recently in

Rosebud Sioux Tribe, supra. The opening of Indian reservations by selling and disposing of a "portion of the reservation" can result in diminished boundaries, especially where an intent to disestablish is further evidenced elsewhere in the Act, in its legislative history, or in the circumstances surrounding its passage. Rosebud Sioux Tribe, 430 U.S. at 586-87. In Rosebud Sioux Tribe, these factors showed that the "sell and dispose" language in the 1907 and 1910 Rosebud Acts was intended to have the same effect as the language of cession in the 1904 Rosebud Act and the 1891 Lake Traverse Act interpreted in DeCoteau v. District County Court, 420 U.S. 425 (1975).[4]

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[4] Similar language was used in a 1910 statute diminishing the boundaries of the Pine Ridge Reservation in South Dakota, and an 1890 Act diminishing the boundaries of the Round Valley Reservation in California. See

2. "Reservation thus Diminished"

Section 2 of the 1908 Act explicitly refers to the two reservations as "the reservations thus diminished." This section does not refer to "the Indian lands thus diminished," but to the diminished "reservation." This phrase is unambiguous; its only possible meaning is that the reservations were to be diminished in size and their boundaries thereby constituted. The reservation was diminished by removing a discrete portion--the opened lands--and thereby contracting its boundaries.[5]

Russ v. Wilkins, 624 F.2d 914 (9th Cir. 1980), cert. denied, 451 U.S. 908 (1981); United States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977).

[5] This construction comports with the usual meaning of the word "diminish" in this context. See § 1, Act of May 30, 1910, 36 Stat.

Bartlett recognizes that subsequent Congressional and Administrative references to the "diminished reservation" described the portion of the original reservation not affected by the 1908 Act. If the word "diminished" referred to a reduction in Indian land ownership, as Bartlett argues, then the opened area, where such a reduction took place--and not the unopened area--would be the "diminished" portion. The dichotomy drawn by Congress and the Executive Branch between the "opened lands" and the "diminished reservation" clearly demonstrates that the 1908 Act was intended to reduce the boundaries of the Cheyenne River and Standing Rock Reservations.

448; Act of May 27, 1910, 36 Stat. 440; Rosebud Sioux Tribe, 430 U.S. at 585, 587, 588, 592, 594, 597, 598, 602, 611, and 614; DeCoteau v. District County Court, 420 U.S. 425, 447 (1975); Seymour v. Superintendent, 368 U.S. 351, 354 (1962); United States v. Pelican, 232 U.S. 442, 445, 449 (1914).

The legislative history of the 1908 Act confirms this construction of the word "diminished" in section 2. In his councils with the Indians regarding the proposed opening, Inspector James McLaughlin repeatedly uses the word "diminished" in conjunction with the redrawing of reservation boundaries. For example, at the Cheyenne River Agency, McLaughlin related his belief that the legislation would create "a permanent diminished reservation" "within the lines I have suggested," as opposed to opening all of the surplus lands. Pet. Br. App. A142-A144. At Standing Rock, McLaughlin specifically discussed section 2, explaining that those receiving allotments in "the portion to be ceded" could relinquish their original allotments and instead "come within the diminished reservation." Pet. Br. App. A87-A88.

McLaughlin was equally explicit in his Report to Congress, which was adopted as a

part of both the House and Senate Committee Reports. For example, McLaughlin spoke of "compact diminished reservations" with their own "outboundaries" separating the previously adjoining reservations. Pet. Br. App. A47. In his Report, McLaughlin also described drawing lines on a map of South Dakota "[i]n order that the Indians might fully understand the boundaries of the proposed diminished reservation." Pet. Br. App. A39.

In their reports, the congressional committees also referred to the "lands reserved for the use of the Indians upon both reservations as diminished." Pet. Br. App. A28. The acreage given for these lands is the acreage of the unopened areas. This clearly indicates that the unopened areas comprised the "reservation as diminished." In addition, the reports also speak of the "reduced reservations." Pet. Br. App. A29. A "reduction" of a reservation signifies an

alteration of boundaries. Russ v. Wilkins, 624 F.2d 914, 922 (9th Cir. 1980), cert. denied, 451 U.S. 908 (1981).

Bartlett also contends that the word "diminished" refers not to "reservations" but to "lands reserved for the use of the Indians," and that the diminished lands included Indian lands in the opened area as well as lands in the closed area. This reading ignores the acreage figures discussed above. The original area of the Cheyenne River Reservation was calculated as 2,874,811 acres. Subtracting the 1,728,000 acres which the reports state were affected by the 1908 Act leaves approximately 1,150,000 acres. This is the acreage given for the reserved lands referred to in the phrase "reservation as diminished." This figure for the reserved lands, however, does not account for any lands in the opened area. Thus, the word

"diminished" clearly is used to describe the reduced size of the reservation, not the reduced acreage of Indian lands throughout the original reservation. See, United States v. A Juvenile, 453 F.Supp. 1171, 1190 (D.S.D 1978).

3. "Public Domain"

The fact that the land might not have been "public lands" in the strict technical sense does not detract from the fact that the use of the term "public domain" in the 1908 Act reflects the intent of Congress. Because "public domain" and "Indian reservation" are mutually exclusive terms, Congress' use of the term clearly reflects an intent to exclude the opened area from the Reservation. See, DeCoteau, 420 U.S. at 446; Seymour, 368 U.S. at 358; Ute Indian Tribe v. Utah, 716 F.2d 1298, 1305 (10th Cir. 1983).

In Rosebud Sioux Tribe, for example, an argument similar to Bartlett's was made with

respect to the use of cession language by Congress in 1904 Rosebud Act. Strictly speaking, the 1904 Act was not a bilateral cession. Nevertheless, the Court held that the use of such language indicated an intent to diminish the reservation boundaries:

> The use of the word "cession" in the 1904 Act, which was not consented to by the required extraordinary majority of the Tribe, does not make the meaning of the Act ambiguous as between diminution of the reservation boundaries on the one hand, and merely opening up designated lands for settlement by non-Indians, on the other. The word is technically misused, but the meaning is quite clear.

Rosebud Sioux Tribe, 430 U.S. at 597.

The fact that some special provisions for entry were made in the 1908 Act does not mean that Congress intended the opened lands to continue as part of the Reservation. Whether opened lands actually became "public lands," subject, without restriction, to all public lands laws, is "logically separate from a question of disestablishment."

Rosebud Sioux Tribe, 430 U.S. at 601 n.24. Thus, where Congress has unequivocally described its intent by the use of "public domain" language, limitations placed on the entry of the lands are not relevant.[6]

4. School Lands

Bartlett argues that the school lands provision contained in section 7 of the 1908 Act is not indicative of an intent to diminish the boundaries of the original Cheyenne River Reservation. He states that this section was simply a separate present grant of lands rather than an implementation of the State's Enabling Act. A similar argument was rejected by this Court with respect to identical provisions contained in the 1910 Rosebud Act. Rosebud Sioux Tribe, 430 U.S.

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[6] In DeCoteau, the Court described the cession statute in question as a restoration to the public domain even though the statute expressly provided that entry would be allowed only under some of the public land laws. DeCoteau, 420 U.S. at 446.

at 599-601. Although Congress had the power to make such grants within existing reservation boundaries, the legislative history "demonstrates that Congress 'included the provision to implement the grant in the enabling act and for no other reason'." Rosebud Sioux Tribe, 430 U.S. at 600. See also, 42 Cong. Rec. 4753-4755 (April 15, 1908).

The House Report of the 1908 Act explicitly stated that the school lands provision was "in accordance with the enabling acts of these States." Pet. Br. App. A26. Furthermore, Congressman Hall explained the school lands provision in the Act as follows:

> I will say that the enabling act . . . provided for the granting in presenti of sections 16 and 36 for school purposes, and then it provided that in the case of the Indian reservations that grant of these sections for school purposes should be held in abeyance until the reservation was opened.

42 Cong. Rec. 4755 (April 15, 1908). The opening in the 1908 Act was clearly perceived as an extinguishment of the reservations within the meaning of the Enabling Act.

5. The Liquor Prohibition

The 1910 amendment to the 1908 Act contained a provision extending the federal Indian liquor prohibition over the opened lands. Despite the fact that the Court in Rosebud Sioux Tribe accorded considerable significance to an identical provision in the 1910 Rosebud Act, Bartlett argues that the presence of such a provision is entirely consistent with continued reservation status and consequently is irrevelant to the question of diminishment.

However, as this Court explained, when Congress was considering the Rosebud and Cheyenne River liquor prohibition extensions in early 1910, it was specifically acting

under its authority, as approved in Dick v. United States, 208 U.S. 340 (1908), to extend federal liquor laws into former reservation areas which had been disestablished and had thus otherwise passed from federal control. See, Rosebud Sioux Tribe, 430 U.S. at 614 n. 47; see also, H.R. Doc. No. 711, 61st Cong., 2nd Sess. (1910).

B. The legislative history and surrounding circumstances support a finding of diminished boundaries for the original reservation.

1. The Historical Setting

The 1908 Act must be viewed in historical context. In South Dakota, that historical context includes the 1904, 1907 , and 1910 Rosebud Acts and the 1910 Pine Ridge Act. All of these Acts diminished the size of the respective reservations. All of these Acts accomplished the same ends: the opening of surplus lands for disposal to homesteaders with payment to be made to the Indians from

the proceeds of the sales. This is not suprising, in that the Acts all had the same beginning, namely section 5 of the General Allotment Act of 1887, 24 Stat. 388.[7] The 1889 Act cited in Rosebud Sioux Tribe, which incorporated section 5 and delineated the boundaries of the original Rosebud Reservation, also delineated the boundaries of the original Cheyenne River Reservation and original Pine Ridge Reservation. As a result, all subsequent negotiations on each reservation were conducted pursuant to the baseline reflected by section 5 of the General Allotment Act.

The language of these Acts is nearly identical, save for the fact that the earliest Rosebud Act incorporated cession language from an earlier agreement which it

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[7] The importance of section 5 of the General Allotment Act is discussed in DeCoteau, 420 U.S. at 432, and Rosebud Sioux Tribe, 430 U.S. at 589-590 n. 6.

unilaterally modified to provide for the delayed payment scheme common to all the Acts. Rosebud Sioux Tribe, 430 U.S. at 592-98. These Acts affected reservations in the same region, had the same Senate sponsor and were presented to the tribes by the same federal official. The legislative debates on the 1910 Rosebud Act are replete with statements likening the 1910 Act to the 1908 Act in question, and making it clear that the similar South Dakota Surplus Lands Act were understood to have the same effect. See Appendix, Rosebud Sioux Tribe, supra, Vol. III, pp. 996, 1064-1065, 1068-1069, 1079-1080, 1083, 1095, 1109-1110, 1122 (Rosebud Acts expressly discussed as precedent that "was being followed" in the 1908 Act).[8] The

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[8] In fact, prior to his councils at Cheyenne River and Standing Rock, Inspector McLaughlin was instructed generally to follow the instructions given him with respect to the 1907 Rosebud Act. Juvenile, 453 F.Supp. at 1178.

Acts must therefore be viewed as part of a unified legislative program of diminishing reservations in South Dakota.

Despite this, Bartlett asks the Court to reach the improbable conclusion that Congress meant one thing in 1907 and 1910 with respect to the Rosebud and Pine Ridge Reservations, but meant something entirely different when it used precisely the same words in 1908 with respect to the Cheyenne River and Standing Rock Reservations.

In making this claim, Bartlett emphasizes the fact that this Court relied in part on its determination of the purpose of the 1904 Rosebud Act in finding the same purpose in the 1907 and 1910 Rosebud Acts. However, the relationship between the three Rosebud Acts is not "unique," as Bartlett suggests. The three Rosebud Acts were distinct statutes opening separate areas to settlement. Rosebud Sioux Tribe, 430 U.S. at 586. The

Court, as well as the parties, recognized that the three Acts, being substantially similar, would have had the same effect and must be viewed together in context. Rosebud Sioux Tribe, 430 U.S. at 606 nn. 29 and 30, 608-609, 612-613. See also, United States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977). The Court independently examined the circumstances of the 1907 and 1910 Acts, and verified that they were intended to have the same effect as the 1904 Act, which utilized language of cession. There is no reason why the 1908 Cheyenne River Act should not also be viewed in its historical context, which includes the other South Dakota Surplus Lands Acts passed during the same period.

2. Familiar Forces

It is suggested that the circumstances of the 1908 Act differ from those of the Rosebud Acts because the "familiar forces"

pressing for the opening of the Rosebud Reservation were not present with respect to the Cheyenne River and Standing Rock Reservations. This assertion is incorrect. To the contrary, the rush for Cheyenne River and Standing Rock lands was comparable to that at Rosebud:

> In 1909 some ten thousand claims became available on the Cheyenne River and Standing Rock reservations, opening to settlement Corson, Dewey, and Ziebach counties in South Dakota and the southern portion of Morton County in North Dakota. The registration was conducted during October at Aberdeen, Bismarck, LeBeau, Lemmon, Mobridge, and Pierre. There were 81,546 applications for claims . . . .

H.S. Schell, History of South Dakota, 255 (2d ed. 1968). See also, Rosebud Sioux Tribe, 430 U.S. at 605-609.

3. Absence of a Cession Agreement

Any reliance on the absence of a formal agreement of cession between the United States

and the Tribes as evidence that the 1908 Act lacked intent to diminish the boundaries of the original reservation is misplaced. Such an agreement is not a sine qua non of disestablishment. Rosebud Sioux Tribe, 430 U.S. at 598 n.20.

The significance of agreements of cession is that where they are present, their contents may be indicative of congressional intent. "The underlying premise is that congressional intent will control." Rosebud Sioux Tribe, 430 U.S. at 586. There is nothing in the circumstances of the 1908 Act to suggest that Congress desired to effect diminishment of the boundaries of the original reservation only if the Tribe had formally agreed to a cession of the territory in question.

To the contrary, quite a different position is clear from a review of the actions taken by Congress with respect to the

1908 Act. In view of Congress' understanding of its authority after 1903, in the wake of Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), it is not surprising that Inspector McLaughlin was sent to the Cheyenne River and Standing Rock Reservations not to negotiate an agreement, but only to ascertain the views of the Indians as to the proposed legislation. While, by 1907, McLaughlin was still negotiating an informal cession, this was not incorporated within the text of the 1907 Rosebud Act. By 1908, Congress had dispensed with even the informal cession agreement, although councils with the Indians remained as part of the process. The same process, as one would expect, was thereafter followed by McLaughlin at Rosebud and Pine Ridge in 1909 and 1910.

Finally, the discussions between McLaughlin and the Indians at both reservations demonstrate the clear understanding of

everyone present that the proposed opening, whatever form it might take, would result in a change in reservation boundaries. See Pet. Br. App. A58-A59, A62, A68, A76, A80, A84, A85, A87-A90, A93, A95-100, A102-A104, A106, A110-A112, A113-A115, A118, A120-A121, A131-A132, A134, A135, A143, A144, A152.

When the 1908 legislation was considered by Congress, there is nothing in the legislative history to indicate that the presence or absence of an agreement was thought to be critical to the effect of the opening. There is every reason to believe that Congress, as it did in the case of the Rosebud Indians, intended the disestablishment of the opened area regardless of formal consent by the Indians.

C. The Subsequent History Supports Diminishment

The jurisdictional history of the affected areas demonstrates that federal and state courts operated for six decades under

the assumption that those areas were no longer a part of the reservation, following the decision of the District Court in United States v. La Plant, 200 F. 92 (D.S.D. 1911). Contrary to the claim made by Bartlett, the importance of La Plant lies not so much in its precedential value, but in the fact that it establishes the operating assumption concerning jurisdiction in this area in the years following the opening. See, Rosebud Sioux Tribe, 430 U.S. at 603.

From 1911 to at least 1972, based on the operating assumption set out in LaPlant, the State exercised civil and criminal jurisdiction over unallotted lands in the opened area. United States v. Dupris, 612 F.2d at 338-339 (McMillian, J., dissenting); United States v. A Juvenile, 453 F. Supp. at 1199-1200. It is not true, as Bartlett claims, that the State's exercise of jurisdiction was

limited to those matters involving only non-Indians. See also, United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973) (1965 state conviction of Indian); United States ex rel. Miner v. Erickson, 428 F.2d 623 (8th Cir. 1970) (1962 state conviction of Indian); Lafferty v. State ex rel. Jameson, 80 S.D. 411, 125 N.W.2d 171 (1963) (1960 state conviction of Indian); State v. Sauter, 48 S.D. 409, 205 N.W.25 (1925) (pre-1925 state conviction of non-Indian for murder of Indians). The long-standing exercise of jurisdiction by the State, together with the repeated decisions of the state Supreme Court confirming such jurisdiction, should be accorded substantial weight. Bartlett suggests that the State's exercise of criminal jurisdiction may not have been premised on disestablishment but rather on a 1929 Act purporting to reserve to the State

criminal jurisdiction over reservations. This statute has never been discussed in any State Supreme Court opinion, and the Attorney General determined in 1940 that the Act was invalid. 1939-1940 Attorney General's Opinions, p. 505. There is no evidence that the statute was ever relied upon, and in fact the State was exercising jurisdiction over the area in question long before its adoption. See, Sauter, supra at 28 (fifteen years after the opening, the state Supreme Court held that the 1908 Act had "chang[ed] the boundary" of the original Cheyenne River Reservation.)

The fact that the United States and the Tribe have also exercised limited jurisdiction in the opened area is not particularly significant. There is no question that both the Tribe and the United States had jurisdiction over trust allotments in the general

area and Indians residing on those allotments, and other lands reserved from disposal for tribal use. DeCoteau, 420 U.S. at 446. In addition, the federal government would retain administrative authority over surplus lands until they were entered by homesteaders, by virtue of their status as sales agent and trustee for the Tribe with respect to the proceeds of the lands. See, Ash Sheep Co. v. United States, 252 U.S. 159, 164-166 (1920). The United States, as guardian for the welfare of tribal Indians, also provides economic and educational benefits outside reservations as well as within their boundaries. See, Rosebud Sioux Tribe, 430 U.S. at 661 n.49. These factors, however, are not illuminating on the question of reservation status. Juvenile, 453 F.Supp. at 1176, 1199-1201.

Two pieces of federal legislation in regard to the area opened by the 1908 Act

also support a finding that the Act diminished the boundaries of the original Cheyenne River Reservation. One of these pieces of legislation was the 1910 liquor amendment, which is discussed in detail in this brief and in the State's initial brief.

The second piece of legislation involved the opening of the portion of the original Cheyenne River Reservation not opened by the 1908 Act. Although this proposal was never enacted, it clearly reflects the contemporary understanding of the 1908 Act.

Senator Gamble introduced S. 3285 in 1909. When the bill was reported out of the Senate Committee on Indian Affairs, some official correspondence was attached to the report. S.Rep. No. 518, 61st Cong., 2nd Sess. (1910). One of the pieces of correspondence was a letter from R.A. Ballinger, Secretary of the Interior, to Moses E. Clapp,

Chairman of the Senate Committee on Indian Affairs. In that letter, Secretary Ballinger states (emphasis added):

> The lands described in Section 1 of the bill comprise all of the Cheyenne River Reservation . . . .

S.Rep. No. 518, supra at 4. The Report itself also states that "the area proposed to be opened is 1,209,600 acres." Id. at 2. Based on the acreage figures set forth in earlier arguments, this figure could not include either the allotted or the unallotted land in the area affected by the 1908 Act. Therefore, in 1910, the Senate Committee on Indian Affairs clearly considered the reservation to be that geographical area which was not included in section 1 of the 1908 Act. See, Juvenile, 453 F.Supp. at 1196.

III. The "Immediate and Irrevocable Cession" Argument Raised by the United States is Totally Inconsistent with Prior Decisions of the Court, and is not a Proper Analysis for Diminishment Questions.

Ignoring the analysis outlined by this Court in Rosebud, the United States proposes an analysis which would turn the diminishment analysis set forth in Rosebud Sioux Tribe on its head. Although admitting the federal policy of the era was designed to "liquidate the Reservation system," the United States contends that this policy was intended to be immediately effectuated only in cases of outright cession of land from the Tribe to the United States in return for a sum certain payment. In all other instances, it is argued, disestablishment would possibly occur only at such time as the opened area "was entirely--or almost entirely--sold off to non-Indian settlers" before the practice of surplus land sales was halted by the Indian Reorganization Act of 1934.

The above analysis, however, is wholly inconsistent with Rosebud Sioux Tribe, DeCoteau, and Mattz v. Arnett, 412 U.S. 481

(1973). Although the United States urges the Court to re-affirm the standards set in the controlling decisions of this Court dealing with diminishment questions, its analysis is directly at odds with the standards set in those decisions.

Instead of focusing on congressional intent by examining each statute and its history, the courts, according to the United States, are to focus on subsequent extrinsic developments in order to ascertain the effect of a particular statute. The United States proposes that, without resort to the legislative history, one must presume that all non-cession opening statutes necessarily had the same legislative intent--the future but conditional disestablishment of the reservation area involved. Rather than examine the text of the Act and its legislative history for indications of congressional intent, the United States suggests that one review what

"Congress would have wished" in light of subsequent developments.

A fundamental problem with the analysis proposed by the United States is that it lacks any historical foundation. There is no evidence that Congress intended the effect of any opening--let alone all--to have a delayed disestablishment effect conditioned on the complete sale of the opened lands. For example, despite the uncertain-sum aspect of the payment scheme, the text of the 1904 Rosebud Act indicated that it had immediate disestablishment effect. Rosebud Sioux Tribe, 430 U.S. at 596 n. 18.

The analysis urged by the United States is therefore wholly artificial. The presence of cession agreements and sum-certain payments are factors which are not dispositive of the question of disestablishment. They are, in fact, only two of many possible

factors to be considered. Rosebud Sioux Tribe, 430 U.S. at 598 n. 20.

The reliance of the United States on the Tribes' retention of an interest in unsold opened lands to support its method of analysis is also unfounded. Although the Indians retained an interest in the surplus lands by virtue of their right to the sale proceeds, it does not follow that the lands were still part of an Indian reservation. As this Court noted:

> "[T]he fact that a beneficial interest is retained does not erode the scope and effect of the cession made, or preserve to the reservation its original size, shape, and boundaries." The question of whether lands become "public lands" under Hitchcock and Ash Sheep, is therefore, logically separate from a question of disestablishment.

Rosebud Sioux Tribe, 430 U.S. at 601, n. 24 (citations omitted).

Further, the Indians' right of occupancy was not merely "suspended." In the case of

the 1908 Act at issue, the Tribe had no "right to resume occupancy" where lands were not sold. There is no provision for reversion to the Tribe, and none was made until the Indian Reorganization Act of 1934, which provided that the Secretary of Interior was authorized to "restore to tribal ownership" any unsold surplus lands. 25 U.S.C. § 463. If the lands had been owned by the Tribes all along, then there certainly would have been no need for Congress to restore them to tribal ownership.

Even if the Court were to adopt the analysis suggested by the United States, it is not at all clear in which category the 1908 Cheyenne River Act would fit. Of the 1.1 million acres to be disposed of at Cheyenne River, only 28,000, or less than 3%, remained vacant after fifteen years. Ultimately, all but 15% of the acreage was sold to non-Indians. This remainder was returned

to the Tribe. These figures illustrate the impracticality of the diminishment analysis suggested by the United States as to the ultimate determination of the time when diminishment of the original reservation boundaries might take place.

The United States concedes that a complete sale of all lands is not required, and asserts that diminishment may be found when the area is "almost entirely" sold. But at what point is this criteria met? Is there a "magic number" of acres that must be sold?

The United States suggests that diminishment may be justified if the character of the land and the population is sufficiently non-Indian. Br. U.S. 20-21. This view ignores two important facts. First, in the case of most surplus lands acts, regardless of whether they involved agreements of cession, Indians were allowed to take allotments in the general area, resulting in a significant

Indian presence and land base even in areas clearly disestablished. See, DeCoteau, 420 U.S. at 428. Second, even where all surplus lands were sold, Tribes have, in many cases, reacquired substantial land holdings. Therefore, the quantum of Indian presence on land ownership in an opened area cannot be used as a reliable standard against which congressional intent should be measured.

CONCLUSION

Petitioners Solem and Meierhenry respectfully request that this Court reverse the decision of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

MARK V. MEIERHENRY
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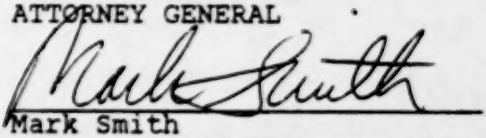

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BRIEF *AMICI CURIAE* OF THE CHEYENNE RIVER SIOUX TRIBE, SOUTH DAKOTA, THE STANDING ROCK SIOUX TRIBE, NORTH AND SOUTH DAKOTA, AND THE ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., IN SUPPORT OF THE RESPONDENT

The Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota, the Standing Rock Sioux Tribe of the Standing Rock Reservation, North and South Dakota, and the Association on American Indian Affairs, Inc., submit this brief *amici curiae* in support of respondent pursuant to Rule 36(2). The parties have consented in writing to its filing.

INTEREST OF AMICI CURIAE

The specific question here presented is whether the Act of May 29, 1908, 35 Stat. 460 (hereinafter the "1908 Act"), disestablished parts of the Cheyenne River Reservation (hereinafter the "Reservation"), which are located

in Dewey County and Ziebach County, South Dakota. The 1908 Act was one of a series of so-called "surplus lands" statutes which were enacted by Congress at the turn of the twentieth century, usually without the consent of the affected Indian tribes, and which opened either all or some portions of the tribes' reservations to settlement by non-Indians.

The Cheyenne River Sioux Tribe (hereinafter the "Tribe") has a direct and immediate interest in proper resolution of the question before the Court because the Reservation, as undiminished, is its home. Approximately 66% of the members of the Tribe today reside within the area opened to settlement under the 1908 Act. U.S. Census Enumerated Districts, South Dakota, Nos. N009A-N0018, N10801A-N1830A, A0001-A0013B, A1800-A1838. *See* U.S. Census Bureau, 1980 Census Summary Tape File 1-A (South Dakota). The town of Eagle Butte, inside the opened area, is the seat of both the tribal government and the Bureau of Indian Affairs Agency office. Approximately 79% of the total Eagle Butte population and approximately half the entire population in the opened area is Indian. U.S. Census Enumerated Districts, South Dakota Nos. A1812-14, A1822-27, *supra*. A decision which excludes the opened area from the Reservation, therefore, would seriously jeopardize the Tribe's ability to govern its members and to protect its lands.

The Standing Rock Sioux Tribe has an equally direct and immediate interest in the outcome of this case. The 1908 Act also affected portions of the Standing Rock Reservation located in Sioux County, North Dakota, and Corson County, South Dakota. Accordingly, a determination by the Court that the 1908 Act reduced the boundaries of the Cheyenne River Reservation undoubtedly would have like consequences with respect to the boundaries of the Standing Rock Reservation and the capacity of the Standing Rock Sioux Tribe to exercise its traditional powers of local self-government.

The Association on American Indian Affairs, Inc., is a non-profit membership corporation organized under the laws of the State of New York for the purpose of protecting the rights and improving the welfare of American Indians. The Association is the largest Indian interest organization in the United States, and is nationwide in scope, with a membership of 50,000 that consists of both Indians and non-Indians. The Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of a brief with this Court in *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975), and the filings of briefs *amicus curiae* in *Ramah Navajo School Board* v. *Bureau of Revenue*, 102 S.Ct. 3394 (1982), *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), and *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977). The Association has an interest in and deep concern about the outcome of this case because, as is evidenced by the *amici curiae* briefs in support of petitioners filed by eleven counties and two towns in six states, a finding here of disestablishment may serve to end the reservation status of tribal lands throughout the West and thus impose upon Indian country today a policy of "termination" which Congress long since has repudiated. *See Bryan* v. *Itasca County*, 426 U.S. 373, 387-88 (1976).

SUMMARY OF ARGUMENT

The issue in this case is whether the heart of the Cheyenne River Reservation—the part of the Reservation where over 65% of the Tribe's members reside, where a majority of all residents are Indians or otherwise directly associated with the Tribe, and where both the seat of tribal government and the Bureau of Indian Affairs Agency are located—was disestablished by the Act of May 29, 1908, ch. 218, 35 Stat. 460. That Act opened a portion of the Reservation to non-Indian settlement. Under the standards set forth by this Court in *Seymour* v. *Superintendent*, 368 U.S. 351 (1962), *Mattz* v. *Arnett*,

412 U.S. 481 (1973), *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975), and *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977), the 1908 Act did not alter the Reservation boundaries.

Under this Court's rulings, certain factors—all looking toward an understanding of congressional intent—are of primary importance in determining whether a reservation has been disestablished. First, was there an agreement by the tribe involved to cede land to the United States for a sum certain, thus creating "an unmistakable baseline purpose of disestablishment"? *Rosebud*, *supra* at 592. Second, did the operative language of the statute expressly terminate the reservation, or at least contain clear language of cession "precisely suited" to disestablishment of its boundaries? *Ibid.* Last, was there a clear intent to disestablish expressed by Congress in the legislative history?

The Cheyenne River Sioux Tribe entered into no agreement to cede or relinquish any of the land opened under the 1908 Act either for a fixed consideration or otherwise. The 1908 Act contained no language terminating the Reservation and no language of cession; instead, the Act simply directed the Secretary of the Interior to "sell and dispose of" all unallotted lands on a portion of the Reservation. No Congressional Committee, and no member of Congress, spoke in terms of terminating the Reservation, changing Reservation boundaries, or a cession. Consistent with the operative language of the 1908 Act, statements by Congress in the legislative history of the 1908 Act contain references merely to "opening" the Reservation.

This Court never has found a reservation to be disestablished in such circumstances, nor has any lower court (except the Supreme Court of South Dakota in its construction of the 1908 Act). In *DeCoteau* and *Rosebud*, this Court found areas to be severed from reservations where less than ten percent of the population was Indian

and little of the land was Indian owned. The *Rosebud* decision left intact as a reservation the county where most Indians lived and the tribal government functioned. *DeCoteau*, *supra* at 428; *Rosebud*, *supra* at 605. At Cheyenne River, where the area opened in 1908 remains to this day predominantly Indian and a vital center of tribal life, a finding of disestablishment would have a disastrous cultural, political and economic impact on the Tribe and its members. As in *Seymour*, *supra* at 358, some parcels in the opened area are held in trust for the Tribe or individual Indians, while other tracts are owned in fee by non-Indians. The longstanding pattern of federal and tribal civil and criminal jurisdiction over Indians on all lands in the area would give way to state regulation and criminal prosecution of Indians on fee lands. More importantly, tribal self-government, "the right of Reservation Indians to make their own laws and be governed by them," [1] would be seriously undermined, as most tribal members no longer would be living on the Reservation. Perhaps most important, this Nation's promise of a homeland for the Tribe would be broken, without the Indians' agreement and without any clear expression that Congress intended such a harsh result.

While this case presents the most serious threat to the Tribe in its modern history,[2] few, if any, adverse consequences would follow for the State and non-Indians if reservation status in the opened area were still recognized. Indeed, the major effect of affirming the decision below would be that Indian criminal defendants who commit crimes on fee land would continue to be tried in federal or tribal courts, not in state forums. Non-Indians accused of crimes would continue to be tried in either federal or state courts, as at present, for since *Rosebud* and *DeCoteau* were decided, this Court has held that

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[1] Williams v. Lee, 358 U.S. 217, 220 (1959).

[2] *Compare, e.g.*, United States v. Sioux Nation, 448 U.S. 371 (1980).

tribal courts have no criminal jurisdiction over non-Indians. *Oliphant* v. *Suquamish Tribe*, 435 U.S. 191 (1978). Moreover, during the past few years, the Court also has ruled that the civil regulatory and taxing jurisdiction of Indian tribes over non-Indian activities is chiefly limited to trust lands. *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Montana* v. *United States*, 450 U.S. 544 (1981). Accordingly, while a decision against continued reservation status would severely disrupt the lives of tribal members, fragmenting the part of the Reservation where the great majority of the Cheyenne River Sioux live and work and dislodging the authority of their government at its seat, a contrary holding would have little, if any, practical impact on the State or its non-Indian citizens.

ARGUMENT

1. Introduction.

The Court's opinions in *Seymour* v. *Superintendent*, 368 U.S. 351 (1962), *Mattz* v. *Arnett*, 412 U.S. 481 (1973), *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975), and *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977), provide the guiding principles for a decision in this case. The "underlying premise is that congressional intent will control." *Rosebud*, *supra* at 586. The "mere opening of a reservation to settlement" by non-Indians does not necessarily mean Congress intended to disestablish the reservation. *DeCoteau*, *supra* at 444. On the contrary, this Court has recognized a strong presumption in favor of continued reservation existence. As explicated in *DeCoteau*:

> This Court does not lightly conclude that an Indian reservation has been terminated. * * * The congressional intent must be clear, to overcome "the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'" *McClanahan* v. *Arizona*

> *State Tax Comm'n*, 411 U.S. 164, 174, quoting *Carpenter* v. *Shaw*, 280 U.S. 363, 367. Accordingly, the Court requires that the "congressional determination to terminate . . . be *expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.*" *Mattz* v. *Arnett*, 412 U.S. at 505. [*DeCoteau, supra* at 444; emphasis added.]

In two recent cases, *Seymour* and *Mattz*, this Court held that statutes opening surplus unalloted lands to non-Indian settlement on the Colville and Klamath River Reservations did not alter Reservation boundaries. In *DeCoteau*, on the other hand, the Court found an unequivocal congressional intent to disestablish because " 'the face of the act', and its 'surrounding circumstances' and 'legislative history' all point[ed] unmistakably to the conclusion that the Lake Traverse Reservation was terminated in 1891." *DeCoteau, supra* at 445. Similarly, in *Rosebud* this Court held that a 1904 surplus lands statute had disestablished a portion of the Rosebud Sioux Reservation because "the process leading up to the enactment of the 1904 Act, as well as the language and legislative history, leads us . . . to the firm conclusion that congressional intent was . . ." to disestablish. *Rosebud, supra* at 603.

All seven of the surplus lands statutes in these four cases had some aspects in common, but not all the acts terminated reservation boundaries. Where the evidence of Congressional intent to disestablish reservation boundaries in less than "unmistakably" clear, the reservation continues undisestablished, as in *Mattz* and *Seymour*. *See DeCoteau, supra* at 445-49; *Rosebud, supra* at 586.

In seeking to ascertain Congressional intent, this Court has looked to a wide array of factors, of varying importance and utility. Three primary factors have emerged from the cases, providing harmony to this area of the law and guidance to the lower courts. These factors are:

1. Did the Indians make an agreement to cede their lands to the United States or agree otherwise that reservation boundaries would be altered?

2. Did the Act opening the reservation contain express language of termination, or, at the very least, clear language of cession?

3. Did the legislative history contain clear expressions from Congress of intent to disestablish the reservation boundaries, rather than merely intent to authorize non-Indian settlement?

This Court never has held reservation boundaries to be altered in the face of negative answers to *all three* of these fundamental questions.[3] Nor has any lower appellate court so ruled, except the South Dakota Supreme Court in its construction of the 1908 Act here at issue. Yet, that result is precisely what the State now seeks. *Amici* submit that this Court should not rule that Congress in 1908 terminated a large portion of the Cheyenne River Reservation without the Indians' agreement, without saying so in language of cession in the Act, and without any statements by members of Congress in the legislative history that they intended to do so.

2. There was no agreement of cession.

In both cases where this Court held reservations to be disestablished—*DeCoteau* and *Rosebud*—the Court stressed the importance of the Indians' agreement to cede the land to the United States in return for a sum certain payment by the United States. This Court ruled that the Indians' agreement is significant not because it was legally required to accomplish the result,[4] but because it provides

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[3] We do not suggest that other factors are entirely irrelevant, but they have been held supportive only. This Court never has used other factors—which are often ambiguous or inconsistent—to find disestablishment in the absence of the three primary guideposts stated above. At most, other factors, such as sections of an act transferring school lands to a State or barring intoxicants in the opened area, have been used as additional indicia supporting disestablishment where intent is otherwise clear based on the primary factors. Rosebud, *supra* at 591-92, 595-96, 599-601, 613-15.

[4] Under Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), this Court ruled Congress had the power to take tribal lands without consent. *See* Rosebud, *supra* at 588.

the clearest indication both that the Congress, in ratifying the agreements, intended to alter reservation boundaries, and that the Indians fairly understood this result would occur. Thus, where Indians agreed to sell their lands and the United States agreed to purchase the lands for a fixed price, the lands unconditionally ceded were no longer part of the reservation.[5] In *Mattz* and *Seymour*, on the other hand, this Court held that where no agreement was concluded with the Indians prior to opening lands for settlement, the clear Congressional intent necessary to a finding of disestablishment was lacking.

The Court in *DeCoteau* emphasized that it was "following and affirming the guiding principles of *Mattz* and *Seymour*." 420 U.S. at 449. The crucial distinction was the presence of a cession agreement. Thus, in *DeCoteau* the Court characterized the 1906 Colville statute at issue in *Seymour* as

> unilateral in character; like that in question in *Mattz*, it merely opened reservation land to settlement and provided that the uncertain future proceeds of settler purchases should be applied to the Indians' benefits. The *Seymour* Court was not confronted with a straightforward agreement ceding lands to the government for a sum certain. [420 U.S. at 488.]

By contrast, according to the Court, the 1891 Lake Traverse Act at issue in *DeCoteau*

> * * * is not a unilateral action by Congress but the ratification of a previously negotiated agreement, to which a tribal majority consented. The 1891 Act does not merely open lands to settlement; it also appropriates and vests in the tribe a sum certain—$2.50

[5] Rosebud and DeCoteau do not mean that all surplus lands acts preceded by an agreement necessarily terminate Reservation boundaries. In each case the history must be examined to determine whether the agreement and statute signified such an intent—as this Court held it did in Rosebud and DeCoteau.

> per acre—in payment for the express cession and relinquishment of "all" of the tribe's "claim, right, title and interest" in the unallotted lands. [420 U.S. at 488.]

In *Rosebud*, the Court reaffirmed the importance of a cession agreement. Here, a three-fourths majority of the Indians had agreed in 1901 to cede all their unallotted lands in Gregory County to the United States for a sum certain.[6] This agreement for an outright sale and purchase again provided the strongest evidence of intent to disestablish. As the Court stated:

> [T]he effect and intent of the 1901 Agreement, if ratified, would have been to change the Reservation boundaries. * * * In this Agreement, therefore, we have—unlike the situation in *Mattz* v. *Arnett* . . . — an unmistakable baseline purpose of disestablishment. [*Rosebud*, *supra* at 592.]

Congress in the 1904 Rosebud Act ratified and amended[7] the 1901 Agreement, clearly stating that it intended to maintain the "baseline purpose of disestablishment" manifested in the 1901 Agreement.[8]

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[6] Article 12 of the Treaty of April 29, 1868, 15 Stat. 635, required the consent of three-quarters of the adult males for a valid Sioux land cession. *See* United States v. Sioux Nation, 448 U.S. 371, 376 (1980).

[7] The amendment concerned the form of payment for ceded lands. Rather than have the United States pay a sum certain, the land was opened to homesteaders, with the Indians to be paid only from money received from the homesteaders. As this Court stressed, however, the disestablishment purpose of the absolute cession agreed to in 1901 was not altered by this amendment. Rosebud, *supra* at 594-96.

[8] The finding of intent to disestablish based upon the 1901 Agreement of cession also underlay the subsequent 1907 and 1910 Rosebud Acts. *See* Rosebud, *supra* at 605-6. No comparison of these latter statutes with the 1908 Act is valid, therefore, because the 1908 Act did not stem from any cession agreement. As the Court pointed out, "[t]he 1907 and 1910 Acts must be considered in con-

Other than the South Dakota Supreme Court in *State* v. *Janis*, 317 N.W.2d 133 (S.D. 1982), and *Stankey* v. *Waddell*, 256 N.W.2d 117 (S.D. 1977), which conflict with the opinion below in construing the 1908 Act, the lower courts invariably have acted in accordance with these principles. Where the Indians agreed to cede their lands to the United States, particularly for a sum certain, the courts have found reservations to be disestablished.[9] The courts have particularly noted that Congress viewed the agreement of the Indians as important where it sought to change reservation boundaries.

A leading example is the Pine Ridge Reservation in South Dakota, the boundaries of which were held to be altered in *United States ex rel. Cook* v. *Parkinson*, 396 F. Supp. 473 (D. S.D. 1975), *aff'd*, 525 F.2d 120 (8th Cir. 1975). The history of a 1910 Act regarding a portion of the Pine Ridge Reservation is examined in detail in that case. In 1908, a bill was introduced in Congress to obtain a cession of a portion of the reservation. Negotiations failed to obtain the consent of the Indians, who did not want to cede the lands in question, and the bill was not enacted. *Id.* at 482-84. A new bill was introduced, changing the lands to be ceded to encompass only lands in Bennett County. Negotiations regarding this new bill were successful, for the Indians agreed to cede the Bennett County lands. Thus, the bill which became the 1910 Act "was not a unilateral action by Congress but a negotiated agreement, to which a tribal majority consented." *Cook*, *supra* at 485. Even though this stat-

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text, and an important part of that context is the 1901 Agreement. . . ." Rosebud, *supra* at 606 n.30.

[9] Disestablishment was found, with the agreement of the Indians, in United States ex rel. Cook v. Parkinson, 396 F. Supp. 473 (D. S.D. 1975), *aff'd*, 525 F.2d 120 (8th Cir. 1975); Ellis v. Page, 351 F.2d 250 (10th Cir. 1965); United States v. Southern Pac. Trans. Co., 543 F.2d 676, 695 (9th Cir. 1976); United States v. Minnesota, 466 F. Supp. 1382, 1384 (D. Minn. 1979), *aff'd*, 614 F.2d 1161 (8th Cir. 1980), *cert. denied*, 449 U.S. 905 (1980).

ute was considered several years after *Lone Wolf* v. *Hitchcock*, *supra*, and Congress knew it could take tribal lands without consent, Congress did not take the major step of changing the boundaries of the reservation without such consent.

Where Congress merely was allotting and opening reservation lands to non-Indian settlement, where no agreement of cession was reached and Congress was acting unilaterally, as in the 1908 Cheyenne River Act, on the other hand, the lower courts have held that no intent to disestablish is manifest.[10] To escape this judicial pattern,

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[10] *See, e.g.*, City of New Town v. United States, 454 F.2d 121, 123 (8th Cir. 1972) (authorizing Secretary to "sell and dispose of" surplus unallotted lands); *United States* v. *Long Elk*, 565 F.2d 1032 (8th Cir. 1977) (authorizing Secretary to "sell and dispose of" surplus unallotted lands); Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982) (surplus unallotted lands "shall be disposed of" by the Secretary). The lack of agreement is seen as crucial by the courts. In *Namen*, for example, the Ninth Circuit stated that, in *Rosebud*, the Supreme Court

> based its conclusion that Congress intended the 1904 statute to diminish the Rosebud Reservation on this explicit link to the prior cession agreements. By contrast, there was no prior cession agreement whatsoever for the Flathead Act to ratify. [665 F.2d at 958.]

Without agreement by the Indians, disestablishment has been found in only two cases, and in each, congressional intent was clear on the face of the statute or its legislative history. In Russ v. Wilkins, 624 F.2d 914 (9th Cir. 1980), the court construed an 1890 statute regarding the Round Valley Reservation in California. That act was enacted "to solve a very specific problem" regarding that reservation, *id.* at 920, the continued encroachment and settlement by non-Indians on lands guaranteed to the Indians. The solution, clearly expressed in the legislative history, was to create a smaller reservation, remove all non-Indians from it and protect the Indians in their smaller home. In Ute Indian Tribe v. Utah, Nos. 81-1827 and 81-1901 (10th Cir., Aug. 29, 1983), the Court of Appeals for the Tenth Circuit held that two series of statutes disestablished the Uncompahgre and Uintah Reservations. The earliest statute in each series—one in 1894 and one in 1902—expressly stated that unallotted reservation lands were to be "restored to the public domain". While the Ute Tribe did not agree to cession of their Reservations

petitioners in their brief, make much of remarks by Inspector McLaughlin during his meetings with the Cheyenne River Indians and his reports to the Secretary of the Interior. Brief of Petitioners, at 38-48. But the critical point is that, unlike Rosebud, the Cheyenne River Sioux did not agree to a cession of any of their lands, nor did these Indians accept Inspector McLaughlin's views. In short, Congress acted unilaterally in the 1908 Act opening surplus lands on the Cheyenne River Reservation for disposal to non-Indians. The fundamental "baseline purpose of disestablishment" of *Rosebud* and *DeCoteau*, manifested in a tribal cession agreement, thus is entirely lacking.

3. There was no statutory language of disestablishment, termination or cession.

In *DeCoteau* and *Rosebud*, the Court ruled that clear language of cession also shows an intent to disestablish.[11]

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as the two statutes had contemplated, the court of appeals ruled that Congress clearly indicated its intent in these earlier statutes that the lands lose reservation status. The Court of Appeals also ruled that, as in *Rosebud*, two later statutes (in 1897 and 1905, respectively) unilaterally opening surplus lands on these reservations simply carried out that congressional purpose. There is, of course, no earlier statute "restoring to the public domain" the lands of the Cheyenne River Reservation and no such clear language of disestablishment in the 1908 Act. Moreover—unlike the portion of the Cheyenne River Reservation opened by the 1908 statute—the Court of Appeals noted that the Utah reservations at issue in *Ute Indian Tribe* have large, majority populations of non-Indians and relatively few Indians residing upon them.

[11] As this Court stated in *Mattz*, Congress knew how to use language of express termination when it sought that result:

> Congress has used clear language of express termination when that result is desired. See, for example, 15 Stat. 221 (1868) ('the Smith River reservation is hereby discontinued'); 27 Stat. 63 (1892) (. . . providing that the North Half of the Colville Indian Reservation, 'the same being a portion of the Colville Indian Reservation . . . be, and is hereby, vacated and restored to the public domain'), and Seymour v. Superintendent, 368 U.S., at 354; 33 Stat. 218 (1904) ('the reservation lines of the

The operative language in the 1891 Lake Traverse Act was that the Indians "hereby cede, sell, relinquish and convey to the United States all their claim, right, title and interest" to the unallotted lands. *DeCoteau, supra* at 445. This language, taken verbatim from the 1889 Agreement, was held "precisely suited" to disestablishment. Similar operative language of cession [12] appeared in the Rosebud 1904 Act, once again taken directly from the underlying 1901 cession Agreement.[13]

In contrast, during this same period, Congress used completely different operative language in many opening statutes. The 1892 Act opening the Klamath River Reservation, for example, provides that surplus lands "are hereby declared to be subject to settlement, entry and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone and timber lands." *Mattz, supra* at 495. Likewise, in the 1906 Colville Act, Congress simply authorized the Secretary of the Interior "to sell and dispose of unallotted lands" under the homestead, mineral and townsite laws of the United States. Act of March 22, 1906, ch. 1126, 34 Stat. 80; *Seymour, supra* at 355. In these cases, where Congress used no language of cession, the reserva-

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said Ponca and Otoe and Missouri Indian reservations be, and the same are hereby, abolished').

Mattz, supra at 504 n.22.

[12] The Indians "cede, surrender, grant and convey to the United States all their right, title and interest" to the unallotted lands. *Rosebud, supra* at 597.

[13] In *Rosebud*, the 1907 and 1910 Acts contained no language of cession. In holding those Acts to disestablish portions of the reservation, the Court relied heavily on the "continued intent," *Rosebud, supra* at 614, expressed by Congress between the 1904 Act—which did contain express language of cession and was based on an agreement with the Indians—and the latter *Rosebud* Acts. *See* note 8 *supra*, at 10.

tions were held to continue and no disestablishment was found.[14]

The 1908 Act contains no language of cession. Like the statutes in *Mattz* and *Seymour*, the operative language of the 1908 Act merely authorized the Secretary to "sell and dispose of" unallotted surplus lands under the homestead and townsite laws. Moreover, other language on the face of the 1908 Act—not present in the 1904 Rosebud Act—strongly buttresses the conclusion that Congress intended continued Reservation existence. First, section 2 of the 1908 Act specified that allotments be provided to all the Indians of the Cheyenne River Reservation prior to opening the surplus land. Allotments could be selected by the Indians in either the opened or unopened portions of the Reservation. In fact, over 55% of the allotments selected by the Indians at Cheyenne River were in the area opened under the 1908 Act.[15] Nothing comparable to this continuing, or even expanded, Indian presence in the opened area was authorized in the 1904 Rosebud Act, which does not include any allotment provision. Second, section 2 of the 1908 Act also required the Secretary to determine if any coal lands existed and to reserve such lands from allotment or disposition. Congress could not have intended to reserve the Tribe's interest in minerals in the opened area, while at the same time terminating the status of that property as part of the Reservation. Significantly, the Rosebud statutes contain no mineral reservation provisions.

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[14] The lower courts have followed this teaching. *See* note 10 *supra*, at 12.

[15] *See* United States v. Juvenile, 453 F. Supp. 1171, 1200 (D.S.D. 1978), *citing* F. Hoxie, "Jurisdiction on the Cheyenne River Indian Reservation: An Analysis of the Causes and Consequences of the Act of May 29, 1908," at 38. The Hoxie Report was part of the record in United States v. Dupris, 612 F.2d 319 (8th Cir. 1979), *vacated and remanded*, 446 U.S. 980 (1980), and was incorporated as part of the record in this case.

Faced with operative statutory language which has been held by this Court to evidence an intent not to disestablish, and in light of other provisions in the 1908 Act which support continued Reservation existence, petitioners here emphasize the reference to a "diminished" portion of the Reservation in section 2 of the Act. As the Eighth Circuit stated, however, this ambiguous language could simply refer to the "diminished" Indian ownership of land within unchanged reservation boundaries. *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684, 687 (8th Cir. 1973). Further, such isolated, ambiguous language in an opening statute is not controlling. For example, in *Mattz*, the statute referred to "what was [the] Klamath River Reservation" (412 U.S. at 498), but no disestablishment was found. The isolated term cited by petitioners cannot overcome the absence of a cession agreement or clear language of cession in the 1908 Act—the two most critical factors developed by the Court.

4. The legislative history of the 1908 Act evidences no clear intent to disestablish.

With no agreement by the Indians, and no statutory language of cession, only the most unequivocal expressions by Congress in the legislative history could support a finding of disestablishment. The scant legislative history of the 1908 Act cannot bear such weight.

In the two Committee reports on the 1908 Act, references are made by the Committees simply to "opening" the Reservation to non-Indian settlement. S. Rept. No. 439, 60th Cong., 1st Sess. 4 (1908); H. Rept. No. 1539, 60th Cong., 1st Sess. 2 (1908). The Committees nowhere call for the altering of Reservation boundaries or mention a "cession."

Congressional debate on the 1908 Act was limited. Again, references to "opening" the Reservation appear: *e.g.*, 42 Cong. Rec. 7004 (1908) ("this bill opens a portion of the Cheyenne and Standing Rock Reservations") (Remarks of Cong. Sherman); 42 Cong. Rec. 7006

(1908) ("Prior to the time of the opening of that reservation the lands are not worth near so much money as they are after the farmers begin to come in, settle and build homes") (Remarks of Cong. Carter). No congressman spoke of a "cession" or of "terminating" or "extinguishing" or "altering" the Reservation boundaries. In short, Congress did not speak even briefly in terms supportive of a finding of disestablishment.[16]

With respect to legislative history, the contrast with *Rosebud* is striking. The legislative history of the 1904 Rosebud Act—statements by the Committee itself in its reports and statements by members of Congress—are filled with specific and clear references to the "cession" of land, and to changed reservation boundaries. For example:

a. "The Committee is informed the Indians are willing to treat a *cession* of the lands in question." H. Rept No. 486, 56th Cong., 1st Sess. 1 (1900).

b. "* * * the purpose [of the bill] of separating the Indians and *extinguishing the reservation* * * *." 35 Cong. Rec. 4807 (1902). (Remarks of Sen. Clapp)

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[16] Petitioners rely on the minutes of the meetings between Inspector McLaughlin and the Cheyenne River and Standing Rock Sioux Tribes, which were attached to the Committee reports. Inspector McLaughlin, of course, was not the United States Congress or a member of it. What Congress said is controlling. Where Congress intended disestablishment—as in *Rosebud*—congressional committees and congressmen clearly said so. Congressional intent should not be lightly inferred through McLaughlin's statements. This is particularly so because Inspector McLaughlin's talk at Cheyenne River, which was poorly attended and achieved no agreement, made no reference at all to reservation boundaries. Moreover, McLaughlin's statements at Standing Rock—to members of a different tribe—all were in the context of describing the sale of surplus lands. His references to the map at Standing Rock concerned determination of how large the opened area was to be and no jurisdictional consequences ever were discussed.

c. "* * * the Indians have no use for this land that is proposed to be *ceded by this bill.* * * * *the Reservation will be left compact and in a square about equal in size to the Pine Ridge Reservation, in South Dakota*" H. Rept. No. 443, 58th Cong., 2d Sess. 3 (1904). (Remarks of Cong. Burke) (Emphasis added.)

As these excerpts from the *Rosebud* legislative history convincingly demonstrate, where Congress intended disestablishment, it clearly said so. No such statements were made by Congress in enacting the 1908 Cheyenne River Act because no disestablishment was intended.[17]

5. Other Factors.

a. *The absence of "familiar forces."*

In the absence of a cession agreement, operative language of cession or a clear legislative expression of intent to disestablish, petitioners seek to rely on less significant factors. Petitioners argue, for example, that disestablishment should be found because the same "familiar forces" of land hungry non-Indians which led to disestablishment of the Rosebud Reservation also existed here. Petitioners ignore the facts. Unlike the statutes at issue in *Rosebud*, the 1908 Act was not a response to land hungry mobs requiring immediate termination of Reservation boundaries. The Act was merely an opening and allotment statute, pursuant to Congress' predominant policy of encouraging non-Indians to settle on reservations,

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[17] Petitioners infer from the fact that the same United States Senator from South Dakota introduced both this legislation and the Rosebud Acts that the consequences for the reservation boundaries must be the same. Similarly, petitioners argue that Inspector McLaughlin's presence as a government representative on both reservations supports a holding of disestablishment. The dispositive issue, though, is not whether the actors were the same, but rather the script of the play as written by *Congress*. With respect to the 1908 Act, the statements of members of Congress in the Committee reports they wrote or the remarks they made on the floor indicate only an intent to open unallotted surplus lands of the Reservation to settlement—nothing more.

to teach Indians the settlers' ways, leading gradually toward assimilation and an eventual termination of tribal relations and reservation existence.

Contrary to petitioners' contention, "familiar forces" were not everywhere the same. At Rosebud, prior to the 1904, 1907 and 1910 statutes, there was intense pressure by masses of near-by settlers clamoring for land on the Rosebud Reservation. When the Rosebud Reservation was opened, land offices were swamped, and the land available immediately swallowed up.

> By the time of the 'opening' of Gregory County, congressional desire for Indian lands was reaching a crescendo. The Gregory County Act provided for approximately 2,422 homesteads of 160 acres each. About a quarter of a million people descended upon the local land offices at Bonesteel, Fairbax, Chamberlain, and Yankton, and 106,308 of these completed applications to be eligible for these 2,422 homesteads. At the Yankton Office, where 57,434 applications were filed, the crowds . . . broke all previous records. The same is true for the Tripp County and Mellette County Acts. A total of 114,769 persons applied for 4,000 homesteads in Tripp County and a similar occurrence was the story of Mellette County.

Smith, *New Town: A Reply*, 18 S.D.L. Rev. 327, 332-33 (1973).

As to lands opened under the 1908 Cheyenne River Act, on the other hand, land pressure was slight. In 1913, when Congress was considering a bill to open the eastern portion of the Standing Rock Reservation, Congress was well aware that the land rush at Rosebud had not been repeated at Cheyenne River and Standing Rock after the 1908 Act. This was illustrated in the following House debate:

> Mr. MANN. Is the gentlemen from South Dakota able to tell the House how many people went up to the Dakotas at the opening of the Rosebud land?
>
> Mr. BURKE of South Dakota. I will say to the gentleman, if he refers to the first opening, which

was that portion in Gregory County, and which was opened, I think, by an act passed in the Fifty-eighth Congress, that there were something like 100,000 people.

Mr. MANN. How many people out of that number were permitted to get homesteads?

Mr. BURKE of South Dakota. There were about 2,500 160-acre tracts, as I remember.

Mr. MANN. That was a very profitable thing for the railroad companies.

Mr. BURKE of South Dakota. I want to say to the gentleman that there has been no opening since that time where there has been anything like that number of people. At the opening of the Cheyenne and the Standing Rock Reservations [under the 1908 Act] which was next to the last one in our State, *there were not sufficient people to begin to take anywhere near the land that was to be disposed of*, and the reason they did not take it was the price of the land, which was undoubtedly too high. [49 Cong. Rec. 1106 (1913) (emphasis added)]

The pressure at Rosebud immediately to terminate the reservation to make way for hordes of settlers obviously was not felt at the Cheyenne River and Standing Rock Reservations in 1908. Rather than a reaction to urgent pressure for land, the 1908 Act was simply an implementation of Congress' fundamental allotment policy of the era. *See Mattz, supra* at 496-97.[18]

b. *Subsequent legislation supports continued Reservation existence.*

Congress, on a number of occasions, has expressed its understanding that the area opened under the 1908 Act remained within the Reservation. In 1910, Congress enacted a law authorizing the sale of lands "in the Chey-

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[18] Allotment looked toward the "*eventual* assimilation [of the Indians] into our society." Organized Village of Kake v. Egan, 369 U.S. 60, 72 (1962) (emphasis added). The entire policy was "repudiated in 1934 by the Indian Reorganization Act." *Mattz, supra* at 497 n.18.

enne River Indian Reservation" to the Milwaukee Land Company. Act of June 23, 1910, ch. 369, 36 Stat. 602. The land "in" the Reservation was land opened under the 1908 Act. H.Rept. No. 1046, 61st Cong., 2nd Sess. 1 (1910). In 1913, Congress enacted a law to open to non-Indian settlement all surplus lands of the Standing Rock Sioux Reservation not covered by the 1908 Act. Act of February 14, 1913, ch. 54, 37 Stat. 675. Section 1 of the 1913 Act authorizes "[t]he Secretary of the Interior * * * to sell and dispose of all *that portion of the Standing Rock Indian Reservation* * * *" within described boundaries "except such portions as have been allotted to Indians." The italicized language and lengthy metes and bounds description are significant. If the 1908 Act really had altered the Reservation boundaries, Congress would not have termed the area to be opened by the 1913 Act a "portion of the Standing Rock Indian Reservation." The "portion" would have been the entire reservation. Nor would a metes and bounds description half a page long have been included; the act could simply have directed the Secretary to "sell and dispose of all remaining unallotted lands of the Reservation." These Acts show Congress, close in time to the 1908 Act, understanding that the 1908 Act did not change Reservation boundaries. Other statutes, over a long time span, reaffirm Congress' understanding. Act of May 28, 1914, ch. 102, 38 Stat. 383 (extension of time for homestead entries); Act of March 4, 1921, ch. 174, 41 Stat. 1446, 1447 (same); Cheyenne River Oahe Settlement Act of September 3, 1954, ch. 1260, 68 Stat. 1191; Submarginal Lands Act of 1975, 25 U.S.C. §§ 459-459e (1976), Pub. L. No. 94-114, 89 Stat. 577.

6. A ruling of disestablishment will have grave consequences for the Cheyenne River Sioux Indians.

The 1980 Census shows that 2,920 or 65.6% of the 4,449 Indians residing in Dewey and Ziebach Counties, South Dakota (which comprise the entire Reservation),

actually live in the opened area. U.S. Census Enumerated Districts, South Dakota, Nos. N009A-N1830A, A001-A0013B, A1800-A1838. *See* U.S. Census Bureau 1980 Census Summary Tape File 1-A (South Dakota). The opened area alone has a total population of 5,848, of whom 49.93% are Indians. *Id.* The tribe, the Bureau of Indian Affairs, the Indian Health Service and various tribal enterprises employ a substantial number of non-Indians, and other non-Indians are members of Indian families by marriage. While the figures cannot be ascertained with precision, no doubt exists that tribal members and persons directly associated with the Tribe constitute a majority of the opened area population.

As explained above, when allotments were selected by tribal members in 1908, a majority chose to locate in the opened portion of the Reservation. The town of Eagle Butte, which lies wholly within the opened area, is the seat of tribal government and the site of most BIA and IHS facilities on the Reservation. Eagle Butte, where respondent's offense is alleged to have occurred, is 78.5% Indian. *Id.*

Unlike both *DeCoteau* and *Rosebud*, therefore, this case does not involve a geographic area composed primarily of fee lands and populated predominantly by non-Indians. *See DeCoteau*, *supra* at 428; *Rosebud*, *supra* at 605-606. Rather, the opened area of the Reservation contains the great majority of the tribal population and serves as the center of the Tribe's economic and political existence.

If the Court were to rule that the Reservation has been disestablished, the impact upon the Tribe and its members will be dramatic. In terms of criminal jurisdiction, for example, the state currently has no authority to try offenses committed by Indians within the opened area, regardless of the identity of the victim and regardless of whether the situs of the crime is fee, allotted or tribal

land.[19] *Cf. United States* v. *John*, 437 U.S. 634 (1978); *Ex parte Crow Dog*, 109 U.S. 556 (1883). If disestablishment is found, on the other hand, offenses by Indians against either Indians or non-Indians which take place on fee lands generally will fall under state jurisdiction. *See Organized Village of Kake* v. *Egan*, *supra*; *Ward* v. *Race Horse*, 163 U.S. 504 (1896).

This Court, in the past, has recognized the unfairness of subjecting Indian offenders to state law. Indian defendants, living in the tribal community and accustomed to having their conduct appraised under tribal law, would suddenly find themselves under

> 'authority and power which seeks to impose upon them the restraints of an external and unknown code. . .; which judges them by a standard made by others and not for them. . . . It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception. . . .'

Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191, 210-11 (1978), quoting *Ex parte Crow Dog*, *supra* at 571. Moreover, apart from hardship for individuals, the Tribe and the United States would be faced with the virtually impossible task of seeking to maintain law and order in a checkerboarded territory, one-half of which lies beyond their reach. See *Seymour*, *supra* at 358.

In terms of civil jurisdiction and, more particularly, the operation of tribal economic programs, a finding of disestablishment would cause even greater disruption. While the existence of a reservation only rarely affects

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[19] The Tribe has exclusive jurisdiction over crimes committed by Indians against Indians, *see* United States v. Quiver, 241 U.S. 602 (1916), unless the offense falls within the Major Crimes Act, 18 U.S.C. § 1153 (1976). Similarly, the Tribe and/or the United States has jurisdiction over crimes by Indians against non-Indians, while the state does not. 18 U.S.C. § 1152 (1976).

state power over non-Indians (*see* pp. 25-27, *infra*), the reservation border serves Indian people as the last and best defense against state intrusions into their right "to make their own laws and be ruled by them." *Williams* v. *Lee*, 358 U.S. 217, 220 (1959). "[F]rom the very first days of our Government, the Federal Government had been permitting the Indians largely to govern themselves free from state interference. . . ." *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685, 686-87 (1965). *See Rice* v. *Olson*, 324 U.S. 786, 789 (1945). This policy of fostering tribal self-government is also the touchstone of current federal Indian policy. *See Ramah Navajo School Board* v. *Bureau of Revenue*, 102 S.Ct. 3394, 3400 (1982); *New Mexico* v. *Mescalero Apache Tribe*, 103 S.Ct. 2378, 2386 (1983).

The existence of a reservation clearly is crucial to the Tribe's full exercise of its sovereign powers. Thus, in the absence of congressional enactments authorizing state jurisdiction, "there has been no satisfactory authority for [state control over] Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation. . . ." *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148 (1973). Unless Congress speaks to the contrary, however, "Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Id.* at 148-49.

For the members of the Tribe in the opened area, therefore, disestablishment of the Reservation would bring them suddenly and involuntarily within the ambit of state contract, tort and sales tax laws, not to mention laws relating to such vital tribal concerns as hunting and fishing, domestic relations, land use planning and the political process. It is no answer to say, as petitioners may, that the Tribe will retain jurisdiction over trust lands in the opened area. *See DeCoteau*, *supra* at 427 n.2. Even given this tribal jurisdiction, the application of state law

in the opened area will be pervasive and the ability of the Tribe to carry on self-government or the federal government to implement its traditional Indian policy will be seriously compromised.

The point is that after building their homes and making their livelihoods in the opened area for 75 years, free from State interference, Indians will discover suddenly that they do not live on a reservation at all. They will find themselves without the protection of the tribal and federal governments. The political, economic, social and cultural displacement will be most profound, and shake the tribal society to its roots.

7. A finding of continued reservation status will not adversely affect non-Indians in the opened area.

If the Court holds that the Reservation has not been disestablished, the division of jurisdiction among federal, state and tribal governments over crimes by non-Indians will not differ materially from their respective authorities in the event of disestablishment. The Tribe, of course, has no power today to try and punish non-Indians for offenses against tribal law under any circumstances. *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978). Crimes committed by non-Indians against non-Indians today fall within state jurisdiction whether or not the situs of the crime is Indian country. *New York ex rel. Ray* v. *Martin*, 326 U.S. 496 (1946); *Draper* v. *United States*, 164 U.S. 240 (1896); *United States* v. *McBratney*, 104 U.S. 621 (1881). Also, regardless of whether the opened area is disestablished, crimes committed by non-Indians against Indians which take place on trust allotments or within dependent Indian communities will remain within the exclusive jurisdiction of the United States. 18 U.S.C. §§ 1151(b) and (c), 1152 (1976); *Williams* v. *United States*, 327 U.S. 711, 714 (1946).

For non-Indians, therefore, the only difference in criminal jurisdiction between disestablishment and continued

reservation status occurs in the event a non-Indian commits a crime against an Indian on fee patented lands outside a dependent Indian community. Such crimes in the opened area would be under federal jurisdiction if the Reservation is preserved, 18 U.S.C. § 1151(a) (1976), but will come under state jurisdiction if the Reservation is disestablished. That difference, however, is largely immaterial, since, unlike the Indian in state court, neither federal nor state court is foreign to a non-Indian.

A similar result obtains with regard to civil jurisdiction. The Court previously has intimated that the statutory definition of Indian country, found at 18 U.S.C. § 1151, also defines tribal territorial jurisdiction. *DeCoteau* v. *District County Court*, 420 U.S. 425, 427 n.2 (1975); *see also Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 478-79 (1976). In *Montana* v. *United States*, 450 U.S. 544 (1981), however, the Court made clear that the mere presence of non-Indians within Indian country does not necessarily give rise to tribal civil jurisdiction over those non-Indians. Instead, tribal authority over non-Indians must be premised upon entry into tribal land, consensual dealing with the tribe or its members, or conduct directly affecting the political integrity, economic security, or health and welfare of the tribe. *Id.* at 565-66. By and large, therefore, even if reservation status is maintained, the conduct of non-Indians except on trust lands within the opened area will be free of tribal control.

Similarly, state civil authority over non-Indians is not dependent upon whether the non-Indians are within or without reservation boundaries. Unless the application of state law directly affects Indians, tribes, their property or federal activities, state law applies with full force to non-Indians on the reservation. *See Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148 (1973); *see also Surplus Trading Co.* v. *Cook*, 281 U.S. 647 (1930); *Thomas* v. *Gay*, 169 U.S. 264 (1898).

Thus, the state can tax real property on the reservation owned by non-Indians, *cf. Maricopa & Phoenix Railroad Co.* v. *Arizona Territory*, 156 U.S. 347 (1895); *Utah & Northern Railway Co.* v. *Fisher*, 116 U.S. 28 (1885), unless, of course, such taxes are preempted by federal law. Absent preemption, the state also can tax personal property owned by non-Indians. *Montana Catholic Missions* v. *Missoula County*, 200 U.S. 118 (1906). Essentially, except for the rare class of cases in which important federal and tribal interests would be compromised, *see, e.g., Ramah Navajo School Board* v. *Bureau of Revenue*, *supra*, the state is free to regulate and tax non-Indian persons, property, and activities whether or not they are located or occur within a reservation. *See Washington* v. *Confederated Tribes*, 447 U.S. 134 (1980). In short, to disestablish the Reservation would add little to the authority of the state over non-Indians in the opened area, while a finding of continued reservation status would give little additional power over non-Indian activities to the Tribe.

CONCLUSION

For the foregoing reasons, *amici curiae* urge that the decision of the court below be affirmed.

Respectfully submitted,

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NO. 82-1253

IN THE

Supreme Court of the United States

October Term, 1983

HERMAN SOLEM, *et al.*,
Petitioners,

v.

JOHN BARTLETT,
Respondent.

On Writ of Certiorari to
The United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE COUNTIES OF DEWEY, ZIEBACH, AND CORSON, SOUTH DAKOTA, AND THE COUNTY OF SIOUX, NORTH DAKOTA AS AMICI CURIAE

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INTEREST OF AMICI CURIAE

The Counties of Dewey, Ziebach, Corson, and Sioux have a special interest in the outcome of this case. These four counties are included within the original boundaries of the two reservations affected by the 1908 Act of Congress at issue in this case, and each county contains a part of the area opened to settlement under the Act.[1] A finding that the opened areas remain within the boundaries of the two reservations will divest the counties of much of their civil, criminal, administrative, and regulatory jurisdiction within those areas. Because of this interest,

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1. This case centers on the status of the opened lands originally within the Cheyenne River Reservation in South Dakota. However, it necessarily affects as well the status of lands originally within the Standing Rock Reservation in North and South Dakota, which were also opened under the 1908 Act. Dewey and Ziebach Counties lie within the original boundaries of the Cheyenne River Reservation, and Corson and Sioux Counties lie within the original boundaries of the Standing Rock Reservation.

and the fact that the area involved represents a substantial portion of the territory of each county, the counties submit this brief as amici curiae.

STATEMENT OF THE CASE

The amici curiae adopt the Statement of the Case set forth in the Brief for the Petitioners. In addition, the counties present the following background to the issue presented by this case.

The original Cheyenne River Reservation was established in 1889 and consisted of some 2.9 million acres of land in western South Dakota. See, e.g., United States ex rel. Condon v. Erickson, 478 F.2d 684, 685 (8th Cir. 1973). In 1908, following consultations between the federal government and the Cheyenne River Sioux Tribe, Congress enacted the statute in question, which directed the Secretary of the Interior to "sell and dispose of" the unallotted lands in portions of both the Cheyenne River Reservation and the

adjacent Standing Rock Reservation. Act of May 29, 1908, 15 Stat. 460 (Appendix of Petitioner (hereinafter "App. Pet.") A1-A16). Pursuant to the provisions of the Act, an area consisting of the western portions of the two reservations and an area along both sides of their mutual east-west boundary -- amounting to a little over half of the original acreage of the reservations -- was opened to settlement in 1910. See H.R. Rep. No. 1539, 60th Cong., 1st Sess. at 3 (1908) (App. Pet. A27); Presidential Proclamation of August 19, 1909, 36 Stat. 2500; 40 Interior Dec. 56 (1910).

It is important to note that this jurisdictional dispute essentially involves the opened and unrestored lands within the original reservation boundaries. There is no dispute over the fact that the unopened portion of the reservation, together with the substantial land area later restored to

reservation status,[2] presently exist as an Indian reservation. There is also no dispute that individual Indian allotments held in trust by the federal government are "Indian country" by virtue of 18 U.S.C. § 1151(c). Nor do the counties question the continued provision of federal services to Indians living within the area. Instead, what is essentially at issue in this case is state and local jurisdiction over non-Indian lands.

The question presented by this case has been the subject of several court decisions. Since the opening of the reservation, the Supreme Court of South Dakota has uniformly held that the opened areas were disestablished

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2. Following the passage of the Indian Reorganization Act in 1934, a substantial amount of land in the opened area which had not been sold was restored to tribal ownership and reservation status by the Secretary of the Interior under Sections 3 and 7 of the Act, 25 U.S.C. §§ 463 and 467. 6 Fed. Reg. 3300 (1941); 14 Fed. Reg. 471 (1949); 17 Fed. Reg. 1065 (1952); 22 Fed. Reg. 3693 (1957); 30 Fed. Reg. 15588 (1965); 32 Fed. Reg. 14276 (1967).

and ceased to be part of the reservations. See State v. Janis, 317 N.W.2d 133 (S.D. 1982); Stankey v. Waddell, 265 N.W.2d 117 (S.D. 1977); State v. Barnes, 81 S.D. 511, 137 N.W.2d 682 (1965); Lafferty ex rel. State v. Jameson, 80 S.D. 411, 125 N.W.2d 171 (1963); State v. Sauter, 48 S.D. 409, 125 N.W. 25 (1925). The federal courts have not been so consistent. The District Court for South Dakota determined in 1911 and in 1978 that the 1908 Act had the effect of disestablishment. United States v. LaPlant, 200 F. 92 (D.S.D. 1911); United States v. A Juvenile, 453 F. Supp. 1171 (D.S.D. 1978), rev'd sub nom. United States v. Dupris, 612 F.2d 319 (8th Cir. 1979), vacated mem., 446 U.S. 980 (1980). However, other decisions of the Eighth Circuit and of the District Court have held to the contrary. See Bartlett v. Solem, 691 F.2d 420 (8th Cir. 1982); United States v. Dupris, 612 F.2d 319 (8th Cir. 1979), vacated mem., 446 U.S. 980 (1980); United States ex rel. Condon v. Erickson, 478 F.2d

684 (8th Cir. 1973), aff'g 344 F. Supp. 777 (D.S.D. 1972).

SUMMARY OF ARGUMENT

Under the principles established by this Court in Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), and DeCoteau v. District County Court, 420 U.S. 425 (1975), there can be no question that the 1908 Cheyenne River Act disestablished the area opened to settlement under the Act. The face of the Act contains plain indications of congressional intent to disestablish, and is indistinguishable from the nearly identical statutes of 1907 and 1910 construed in Rosebud. The legislative history, which includes committee reports and records of negotiations with the Indians, further demonstrates the intent apparent on the face of the Act. This intent is also confirmed by circumstances surrounding the enactment and implementation of the Act, and by the subsequent treatment

of the opened areas by Congress, the executive branch, and the courts.

ARGUMENT

I. THIS COURT HAS ESTABLISHED CLEAR PRINCIPLES FOR DETERMINING QUESTIONS OF RESERVATION DISESTABLISHMENT BY ACTS OF CONGRESS.

In determining the effect of congressional enactments on the boundaries of Indian reservations, the intent of Congress controls. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586 (1977); DeCoteau v. District County Court, 420 U.S. 424, 442, 444 (1975). The decisions in Rosebud and DeCoteau outline several factors to be examined when determining the effect of statutes, like the 1908 Act, which opened surplus Indian lands to non-Indian settlement: the face of the Act at issue, its legislative history and surrounding circumstances, and its subsequent treatment by courts and government officials. Rosebud at 587, 603; DeCoteau at 442, 444. As is detailed below, a full consideration of all

these factors with respect to the 1908 Cheyenne River Act leads to the unavoidable conclusion that Congress intended to alter the boundaries of the Cheyenne River and Standing Rock Reservations by disestablishing the areas opened to settlement under the Act.

II. THE FACE OF THE 1908 ACT CLEARLY REFLECTS AN INTENT TO DISESTABLISH.

A. The Cheyenne River Act and the Rosebud Acts

What is perhaps most striking about the 1908 Cheyenne River Act is its strong resemblance to the 1907 and 1910 Acts which opened portions of the nearby Rosebud Reservation, and which were construed by this Court in Rosebud Sioux Tribe v. Kneip to have the effect of disestablishment. A side-by-side comparison of the pertinent provisions of the three statutes reveals only trivial differences. See Amici App. (attached hereto) A1-A19. Furthermore, there is nothing in the history or language of the 1908 Act to suggest

that it was to have an effect any different from the Rosebud Acts.[3] Since no logical distinction can be drawn between the Cheyenne River and Rosebud statutes, it must be presumed, in the absence of any contrary indication, that they shared an identity of purpose. Therefore, the similarity in language and time between the Cheyenne River Act and the Rosebud Acts renders Rosebud controlling. See also United States ex rel. Cook v. Parkinson, 525 F.2d 120, 125 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977) (Rosebud controlling as to effect of virtually identical 1910 Pine Ridge Act).

B. "Sell and Dispose"

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3. In Rosebud, the Cheyenne River Sioux Tribe, among others, submitted an amicus brief which equated the 1908 Act and other surplus lands acts with the Rosebud Acts and argued that if the lower court's opinion in Rosebud were upheld -- which it was -- jurisdiction over the area opened by the 1908 Act would lie with the State. Brief Amici Curiae of the Association on American Indian Affairs, Inc., et al. at 2-4, Rosebud Sioux Tribe

In the operative language of the 1908 Act, contained in Section 1, Congress "authorized and directed" the Secretary of the Interior "to sell and dispose of" certain described portions of the Cheyenne River and Standing Rock Reservations, except those tracts which had been allotted to individual Indians. 35 Stat. 460, App. Pet. A1. Although the Court has stated that "[t]he mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status," it has also found statutes with identical language to have the effect of disestablishment. Rosebud, 430 U.S. at 586-87, 608-09, 612-13 (emphasis added).

Since the focus of the present inquiry is congressional intent, the 1908 Act "must be read in light of the common notions of the day and the assumptions of those who drafted

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(cont.)
v. Kneip, 430 U.S. 584 (1977).

them." Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206. See generally Rosebud, 430 U.S. at 594-602. At the time the 1908 Act was passed by Congress, an Indian reservation was understood to be "a certain defined tract appropriated to certain purposes," that is, the use and occupancy of a particular group of Indians. Minnesota v. Hitchcock, 185 U.S. 373, 390 (1902). Accord R. Strickland, et al., Felix S. Cohen's Handbook of Federal Indian Law 34-35 (1982). Thus, once Indian title to a reservation area was extinguished, the area was no longer "reserved" for the specific purpose of providing a home for Indians and by definition ceased to be an Indian reservation. See Clairmont v. United States, 225 U.S. 551, 560 (1912) (cession of railroad right-of-way); Hollister v. United States, 145 F. 773, 778 (8th Cir. 1906) (surplus lands acts in South Dakota). The language in the 1908 Act providing for the sale and disposition of certain portions of

the Cheyenne River and Standing Rock Reservations is therefore an indication that Congress intended to disestablish those areas.

C. "Reservations thus Diminished"

More explicit than Section 1 is Section 2 of the Act, which provided that Indians who had selected allotments in the areas to be opened under Section 1 were to be allowed to relinquish these allotments in exchange for an allotment "anywhere within the respective reservations thus diminished." 35 Stat. 461, App. Pet. A5 (emphasis added). The use of the phrase "thus diminished" is an unmistakable and unequivocal indication that Congress intended to diminish the size of the reservation by the sale and disposition of lands under Section 1.[4] See Rosebud Sioux

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4. In Erickson, the Court of Appeals suggested that this phrase did not refer to the diminution of the size of the reservation, but to a reduction in the acreage owned by Indians. 478 F.2d at 687. This interpretation ignores not only the history of the Act but the logical sense of the phrase -- the

Tribe v. Kneip, 521 F.2d 87, 111-12 (8th Cir. 1975), aff'd, 430 U.S. 584 (1977). In Rosebud, this Court found a similar provision in the 1910 Rosebud Act to be "a strong indication" of an intent to disestablish. 430 U.S. at 613-14. See Amici App. A5.

D. "Public Domain"

Another explicit expression of disestablishment intent appears in Section 9 of the 1908 Act, which, among other things, provided that Indians residing in certain townships in the opened area retained a right to take timber in those townships, but for "only as long as the lands remained part of the public domain". 35 Stat. 464 (App. Pet. A16) (emphasis added). Clearly, the Act contemplated that the lands to be opened were to be restored to the public domain, and would remain so until sold to settlers. The

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(cont.)
language in question speaks of diminished "reservations", not a diminished Indian land base.

decisions of this Court have established beyond question that restoration to the public domain is wholly inconsistent with continued reservation existence and is synonymous with disestablishment. Rosebud, 430 U.S. at 589 n.5; DeCoteau, 420 U.S. at 426-27, 446, 448-9; Seymour v. Superintendent, 368 U.S. 351, 358 (1962). The reference to "public domain" in the 1908 Act is thus an unequivocal indication of an intent to disestablish. Stankey v. Waddell, 256 N.W.2d 117, 126-27 (S.D. 1977).

E. School Lands

Further confirmation of disestablishment intent is found in the "school lands" provisions of Sections 1 and 7, which specified that the sixteenth and thirty-sixth sections of each township were not to be subject to homestead entry but instead were to be granted to the States for school purposes. 35 Stat. 461, 463, App. Pet. A12-A13. The significance of such a provision has been fully explained

by this Court in Rosebud with regard to virtually identical provisions in the three Rosebud Acts. See Amici App. A3, A15-A16. Compare Rosebud, 430 U.S. at 599-601, 608 n.35 with United States v. A Juvenile, 453 F. Supp. 1171, 1192 (D.S.D. 1978), rev'd sub nom. United States v. Dupris, 612 F.2d 319 (8th Cir. 1979), vacated mem., 446 U.S. 980 (1980). The "natural construction" of this provision is, as in Rosebud, to read a congressional intent to disestablish the opened lands, thereby making the sections available for disposition to the states as school sections under the Enabling Act. 430 U.S. at 601.

F. The Liquor Prohibition

Still another pertinent indication of the intent of the 1908 Act is a provision in Section 8, added by amendment in 1910, which prohibited the introduction of intoxicating liquors into the opened area for a period of twenty-five years. Act of February 17, 1910, 36 Stat. 196. This provision is identical to a

provision in the 1910 Rosebud Act which the Court interpreted to "reflect strongly" an intent to disestablish. 430 U.S. at 613-14. See Amici App. A17. Compare Rosebud at 613-14 with A Juvenile, 453 F. Supp. at 1197-98, and Stankey, 256 N.W.2d at 126.

III. THE LEGISLATIVE HISTORY OF THE 1908 ACT AND THE CIRCUMSTANCES SURROUNDING ITS ENACTMENT CONFIRM THAT ITS PURPOSE WAS DISESTABLISHMENT.

A. The Federal Policy of the Period

The 1908 Act cannot be interpreted in a historical vacuum. In order to better understand the purposes of legislation, it is useful to view it against the backdrop of the governmental policies prevailing at the time of enactment, which form part of the Act's surrounding circumstances.

During this period, the federal government adopted a policy directed toward the eventual assimilation of the Indian population into the mainstream of non-Indian society. See Montana v. United States, 450 U.S. 544, 559 n.9 (1981); Act of February 8,

1887, 24 Stat. 388 (General Allotment Act); Act of March 2, 1889, 25 Stat. 888 (Sioux Allotment Act). One of the more important aspects of this policy was the reduction in the size of existing Indian reservations, which were viewed as obstacles both to the advancement of the Indians and the settlement and agricultural development of the West by non-Indians. See, e.g., Montana v. United States, 450 U.S. at 559 n.9; Draper v. United States, 164 U.S. 240, 246 (1896); United States v. Dupris, 612 F.2d at 326-28 (McMillian, J., dissenting); Rosebud Sioux Tribe v. Kneip, 521 F.2d at 102; Hollister v. United States, 145 F. 773, 777 (8th Cir. 1906).

The usual means employed by Congress to reduce the size of Indian reservations was to dispose of the reservation lands considered surplus to the needs of the Indians by selling those lands to non-Indian settlers. In the 1880's and 1890's, such surplus land acts were ordinarily in the form of agreements with the

Indians, which often provided for the cession of lands to the United States for a certain sum of money. See, e.g., DeCoteau v. District County Court, 420 U.S. 425 (1975). In the early 1900's, however, Congress adopted a "new policy," opening lands by unilateral acts of Congress and providing compensation for these lands only as payments were received from actual settlers. Rosebud Sioux Tribe v. Kneip, 430 U.S. at 592.

The application of this Indian surplus lands policy is clearly reflected in the history of the non-Indian settlement of South Dakota during the period. In 1889, by way of agreement with the Sioux Indians, Congress provided for the restoration to the public domain of about half of the original Great Sioux Reservation, and for the creation of six new separate reservations out of the remainder. Act of March 2, 1889, 25 Stat. 888. In 1891 and 1894, cession agreements were ratified which opened all the unallotted

lands in the Lake Traverse and Yankton Reservations. Act of March 3, 1891, 26 Stat. 1035; Act of August 15, 1894, 28 Stat. 286. A cession agreement was later entered into with the Rosebud Sioux, but the terms of this agreement were unilaterally altered by Congress. Act of April 23, 1904, 33 Stat. 254. Over the next ten years, Congress unilaterally enacted a series of substantially identical surplus lands acts, providing for the opening of portions of other reservations in South Dakota. Act of April 21, 1906, 34 Stat. 124 (Lower Brule); Act of March 2, 1907, 34 Stat. 1230 (Rosebud); Act of May 29, 1908, 35 Stat. 460 (Cheyenne River and Standing Rock); Act of May 27, 1910, 36 Stat. 440 (Pine Ridge); Act of May 30, 1910, 36 Stat. 448 (Rosebud); Act of February 14, 1913, 37 Stat. 675 (Standing Rock). Most of the above statutes are currently understood to have had disestablishment effect. See Rosebud Sioux Tribe v. Kneip, 430 U.S. at 588 (1904, 1907,

and 1910 Rosebud Acts); DeCoteau v. District County Court, 420 U.S. 425 (1975) (1891 Lake Traverse Act); United States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977) (1910 Pine Ridge Act); Lower Brule Sioux Tribe v. South Dakota, 540 F. Supp. 276, 281 (D.S.D. 1982), rev'd on other grounds, No. 82-1635 (8th Cir., June 27, 1983) (1906 Lower Brule Act); State v. Williamson, 87 S.D. 512, 211 N.W.2d 182 (1973) (1893 Yankton Act). See also Perrin v. United States, 232 U.S. 478, 480 (1914). (1894 Yankton Act)

B. The Legislative History of the 1908 Act

1. Negotiations with the Indians

In 1907, the "familiar forces" described in Rosebud and DeCoteau began to affect the Cheyenne River and Standing Rock Reservations, prompting demands to open up the surplus lands of the reservations to non-Indian settlement. United States v. A Juvenile, 453 F. Supp. at 1176-77, 1197. See generally Rosebud, 430

U.S. at 590, 606, 609; DeCoteau, 420 U.S. at 431-32. In December of 1907, Senator Gamble of South Dakota, who was also the Senate sponsor of the Rosebud Acts and the 1910 Pine Ridge Act, introduced a bill to open parts of the Cheyenne River and Standing Rock Reservations. S. 1385, 60th Cong., 1st Sess. (1907). See also H.R. 17825, H.R. 17884, 60th Cong., 1st Sess. (1908). The Commissioner of Indian Affairs then directed Indian Inspector James McLaughlin to proceed to the two reservations to explain the proposal to the Indians and to solicit their views. A Juvenile at 1177-78. Scarcely a year before, Inspector McLaughlin had conducted councils with the Rosebud Indians regarding the legislation which became the 1907 Rosebud Act,[5] and the

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5. Inspector McLaughlin was also sent by the federal government to conduct the discussions with the Indians concerning the 1904 and 1910 Rosebud Acts, as well as the 1910 Pine Ridge Act. Rosebud, 430 U.S. at 590-94, 606-07, 610-11; United States ex rel. Cook v. Parkinson, 396 F. Supp. 473, 480-88 (D.S.D.), aff'd, 525

Commissioner advised McLaughlin to follow his instructions regarding Rosebud "so far as applicable." A Juvenile, 453 F. Supp. at 1178.

Inspector McLaughlin journeyed to the two reservations in March, 1908, holding councils first with the Indians in the Standing Rock Reservation. H.R. Rep. No. 1539, 60th Cong., 1st Sess. at 5 (1908); S. Rep. No. 439, 60th Cong., 1st Sess. pt 2 at 2 (1908); App. Pet. A37. The transcripts of these councils very clearly indicate that both Inspector McLaughlin and the Indians understood that the proposed legislation would disestablish a portion of the reservation. This understanding is reflected in numerous references to new boundaries, cession and relinquishment of the opened portion, and the creation of a "diminished reservation." App. Pet. A58-A59, A62 (remarks of Inspector McLaughlin), A68 (remarks of Arthur Tibbets),

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F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977).

A76 (remarks of Antoine Derockbrain), A80 (remarks of John Grass), A84, A85, A87-A90, A93, A95-A100 (remarks of Inspector McLaughlin), A102-104 (remarks of Thomas Frosted), A106, A110-A112 (remarks of Inspector McLaughlin), A113-A115 (remarks of Siaka), A118 (remarks of High Bear), A120-A121 (remarks of Inspector McLaughlin).

One representative passage is the following statement of McLaughlin:

> Now, my friends, as to the lines which I have marked on this map in blue pencil for you to relinquish, if every Indian on this reservation were to receive an allotment within the diminished reservation it would still leave you about 500,000 acres of surplus land, and as there are a great many of your people allotted in the tract that will be ceded, you will therefore have a great many acres of surplus land within your diminished reservation.
>
> The Marshall bill gives you permission to select any lands you may wish in the portion to be ceded, or those who are allotted there may relinquish if they so desire and come within the diminished reservation.

App. Pet. A87-A88

The transcript of the councils held by McLaughlin and the Indians at the Cheyenne River Reservation, like those at Standing Rock, contain repeated references which clearly indicate that these discussions were also conducted with the understanding that the legislative proposals would have the effect of disestablishment. App. Pet. A131-A132, A134, A135, A143, A144 (remarks of Inspector McLaughlin), A152 (remarks of Allen Fielder). For example, McLaughlin stated at one point:

> I was for many years in favor of leaving the boundaries of Indian reservations undisturbed; but results of the system have caused me to change my mind relative to same, and I now believe, even if such were possible, that large reservations for Indians, much of which is not occupied by them, is not for the best interests of the Indian occupants.

App. Pet. A134.

This understanding was carried forward in Inspector McLaughlin's report to the Secretary of the Interior, which, like the council transcripts, was adopted as part of

the House and Senate Reports of the legislation. In his report, McLaughlin spoke several times of the "cession" or relinquishment of lands and the proposed boundaries of the "diminished" reservations. App. Pet. A38-A40, A44-A47, A48-A50. In particular, McLaughlin stated that he drew lines on a map of South Dakota so that the Standing Rock Indians "might fully understand the boundaries of the proposed diminished reservation." App. Pet. A39.

It is plain from the above materials that it was the understanding of the Indians and of Inspector McLaughlin that the proposed opening, whatever its scope, would result in disestablishment of the area affected.[6] Even

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6. There was no formal written agreement entered into by McLaughlin and the Indians. Nevertheless, McLaughlin was satisfied that the Indians at each reservation had generally agreed to the proposal. App. Pet. A38, A41, A46, A49, A51; S. Rep. No. 439, pt. 2 at 2-4. This Court has made it clear that Congress knew at the time that it could unilaterally terminate reservation

more importantly, it is equally apparent that this understanding was shared by the House and Senate Committees and by Congress as a whole. The report of Inspector McLaughlin and the transcripts of the councils with the Indians were incorporated by the Committees as part of their printed report accompanying the legislation as transmitted by the Committees to the floor of their respective houses, without qualification or any other indication that the perception of the legislation expressed in these documents was not also the perception of the Committees. Therefore, it can only be concluded that the Committee was

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status and that Indian consent is therefore not necessarily relevant to a question of disestablishment. Rosebud, 430 U.S. at 587-88, 598 & n.20. The circumstances of the 1908 Act do not differ from those of the 1910 Rosebud Act, in which Inspector McLaughlin "did not seek to negotiate an agreement with the Indians, but reported back to the Secretary of the Interior the 'practically unanimous' concurrence of the Indians" in the opening. 430 U.S at 610.

in full agreement with the understanding when it considered and approved the legislation and presented it for consideration by the whole houses of Congress.

2. Congressional Consideration

On April 1, 1908, the Senate Committee on Indian Affairs reported S. 1385, with some amendments. S. Rep. No. 439, 60th Cong., 1st Sess. (1908). In particular, the Committee adopted Inspector McLaughlin's recommendations as to the tract to be opened to settlement, and stated that the bill had been submitted to the Indians and that it had been amended to conform to the understanding reached with each group of Indians. Id. at 4; App. Pet. at A27-A29. In addition to Inspector McLaughlin's report, the portion of the Senate Report prepared by the Committee refers to the "reduced" and "diminished" reservations, and thus also indicates that the Committee understood that the Cheyenne River bill would disestablish the opened area. Id.

at 4, 5 (App. Pet. A28-A29). The bill passed the Senate without debate, following the proposal and adoption of the Committee amendments and a few amendments offered by Senator Gamble. 42 Cong. Rec. 4753-55 (Amici App. B1-B12).

Following passage by the Senate, S. 1385 was reported, with some amendments, by the House Committee on Indian Affairs. H.R. Rep. No. 1539, 60th Cong., 1st Sess. (1908); 42 Cong. Rec. 5455. It is particularly noteworthy that the House Committee expressly adopted, as part of its Report, all of the discussion of the bill in the Senate Report and the entire report of Inspector McLaughlin. App. Pet. A27. It is thus evident that the House Committee shared the perception of the bill held by the Senate, Inspector McLaughlin, and the Indians, and that the bill was transmitted to the House floor with the baseline purpose of disestablishment. Furthermore, the House Report demonstrates that Congress included the

school lands provision of the Act for the same reason that it included nearly identical provision in the Rosebud Acts. App. Pet. A26. See Rosebud, 430 U.S. at 599-600.

Although the debate on the bill in the House centered on other matters, there are references in the debate confirming that the intent of Congress was to reduce the size of the reservations. See, e.g., 42 Cong. Rec. 7005-7006 (1908) (Amici App. B16 (remarks of Rep. Sherman - school lands), B21 (remarks of Rep. Hall - school lands), B23 (remarks of Rep. Hall - Cheyenne River opening likened to Rosebud opening), B25 (remarks of Rep. Carter -- "what is now the reservation")).

While there was little debate as to the effect of the 1908 Act, this fact is hardly surprising in light of the historical context of the legislation. As noted above, Congress had passed three similar surplus lands acts with respect to other reservations in South Dakota in the years immediately preceding the

consideration of the Cheyenne River legislation, and the effect of such statutes must therefore have been well known. See Act of April 23, 1904, 33 Stat. 254 (Rosebud); Act of April 21, 1906, 34 Stat. 124 (Lower Brule); Act of March 2, 1907, 34 Stat. 1230 (Rosebud). In determining the effect of the 1907 and 1910 Rosebud Acts, this Court examined the statutes in the context of the 1904 Rosebud Act and found nothing in the language or history of the later acts to indicate an intent different from that of the 1904 Act. See Rosebud, 430 U.S. at 606 n.30, 609, 614-15. In this case, the 1908 Act should likewise be examined against the backdrop of other similar statutes opening reservation lands in South Dakota, which were, for the most part, sponsored by the same members of Congress and comprise part of the same legislative program. See United States v. Dupris, 612 F.2d at 326-27 (McMillian, J., dissenting); United States ex rel. Cook v. Parkinson, 525 F.2d at 123. In

this setting, the lack of debate on the 1908 Act must be viewed as an indication that its purpose was no different from that of the other acts.[7] It is inconceivable that Congress, without any discussion, would enact several virtually identical statutes over the same period of time and intend them to have radically variant results.

3. The 1910 Amendment to the 1908 Act.

The history of the 1908 Act following its passage also supports the conclusion that the Act had disestablishment effect. In 1908 and 1909, before the lands were opened, proposals were made to raise the price to be paid the Indians for the school lands provided to the States. S. 7914, 60th Cong., 2d Sess. (1908); S. Rep. No. 764, 60th Cong., 2d Sess. (1909); S. 3286, 61st Cong., 2d Sess. (1909); H.R.

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7. Congressional consideration of the 1907 and 1910 Rosebud Acts was similarly characterized by an absence of debate concerning the jurisdictional effect of the Acts. See Appendix at 877-94, 1052-1233, Rosebud Sioux Tribe v. Kneip.

12438, 61st Cong., 2d Sess. (1909); H.R. Rep. No. 48, 61st Cong., 2d Sess. (1910); S. Rep. No. 165, 61st Cong., 2d Sess. (1910). This amendatory legislation resulted in the Act of February 17, 1910, 36 Stat. 196. The history of this legislation again reaffirms to connection between the school lands provision and the enabling act, and bolsters the conclusion that the 1908 Act had disestablishment effect. See 43 Cong. Rec. 1667 (1909) (remarks of Sen. Gamble); 45 Cong. Rec. 504, 738, 739 (1910) (remarks of Sen. Gamble) (Amici App. C3, C7-C8, C10, C12-C13). In particular, Senator Gamble stated:

> By the [1908] Act itself. . . the lands become a part of the public domain, and the original grant to the States at that time becomes operative.

45 Cong. Rec. 739 (Amici App. C13) (emphasis added).

Another feature of the 1910 amendment was the amendment prohibiting the introduction of liquor into the opened area for a period of

twenty-five years following the opening. 36 Stat. 197. It is apparent from the history of this portion of the amendment that the 1908 Act was understood to terminate the reservation status of the opened area, and that it was enacted for the same reasons as was the virtually identical provision in the 1910 Rosebud Act.[8] See Amici App. A17. Compare Rosebud Sioux Tribe v. Kneip, 430 U.S. at 613, with 45 Cong. Rec. 1769-70 (1910) (remarks of Reps. Burke and stafford) (Amici App. C53-

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8. The legislative material cited by the United States in Dupris, which the Court of Appeals regarded as support for its conclusion that the liquor provision was of little importance, does not directly relate to the amendment in question, but is instead a report of a separate bill aimed at the opening of the portions of the Cheyenne River and Standing Rock Reservations left unopened by the 1908 Act. United States v. Dupris, 612 F.2d at 322. See S. Rep. No. 518, 61st Cong., 2d Sess. (1910). The fact that the report referred to the application of a liquor amendment throughout all of the original reservation - and understandably so, since all of the reservation was to be opened - apparently led to some confusion on the part of the court in Dupris.

C57); H.R. Doc. No. 711, 61st Cong., 2d Sess. at 1 (1910). First of all it is clear from the legislative debate that the liquor prohibition, as in Rosebud, was deemed to be necessary because the opened areas would no longer be subject to federal jurisdiction and the federal proscription against the introduction of liquor into Indian country.[9] Moreover, Burke likened the prohibition amendment to a similar provision in a cession statute extending federal liquor laws to lands formerly part of the Yankton Reservation. See Act of August 15, 1894, 28 Stat. 286; Perrin v. United States, 232 U.S. 478, 480 (1914).

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9. A letter to Congress from the Secretary of the Interior, accompanying a draft of the Cheyenne River amendment, specifically relied on the decision in Dick v. United States, 208 U.S. 340 (1908), as a basis for the Cheyenne River Liquor prohibition. H.R. Doc. No. 711, 61st Cong., 2d Sess. at 1 (1910). As explained in Rosebud, Dick involved a similar prohibition in a cession statute which unquestionably had the effect of

4. The Presidential Proclamation

On August 19, 1909, President Taft issued a proclamation, as required by the 1908 Act, opening the affected lands to settlement. Proclamation of August 19, 1909, 36 Stat. 2500. There is nothing in this Proclamation to suggest that the purpose of the 1908 Act was not disestablishment. In fact, the Proclamation is indistinguishable from the 1908 and 1911 Proclamations which implemented the 1907 and 1910 Rosebud Acts. See Proclamation of August 24, 1908, 35 Stat. 2203 (reproduced in Appendix for Respondents, Rosebud Sioux Tribe v. Kneip, at 57). Thus, there is no reason to believe that the President's understanding of the intended effect of the 1908 Cheyenne River Act was any

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(cont.)
disestablishment. 430 U.S. at 614 n.47.

different from that of the Rosebud Acts.[10]

IV. THE SUBSEQUENT HISTORY OF THE AREAS OPENED UNDER THE 1908 ACT CONFIRMS THAT THE ACT HAD THE EFFECT OF DISESTABLISHMENT

A. Subsequent Congressional Treatment

The treatment of the Cheyenne River and Standing Rock areas in the years following the passage of the 1908 Act demonstrates that Congress itself understood that the Act had the purpose of disestablishment. This perception is illustrated in a series of statutes extending the time in which homestead settlers in the opened area were required to make payments for purchase of the lands. For example, in a number of the extension statutes and their legislative histories, the opened

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10. Given this similarity between the Cheyenne River and Rosebud Proclamations, there would appear to be little validity to respondent's argument that the differences between the 1909 Cheyenne River Proclamation and the first Rosebud Proclamation of 1904 constitute grounds for distinction between the Cheyenne River and Rosebud Acts. See Brief of Respondent in Opposition to Petition at 11-12.

lands are described as "former" reservation lands, "formerly a part of" the reservation, or "ceded" lands. See Act of April 13, 1912, 37 Stat. 84, Act of April 25, 1922, 42 Stat. 499; Act of March 3, 1925, 43 Stat. 1184; Act of March 31, 1928, 45 Stat. 400; Act of February 14, 1931, 46 Stat. 1107; S. Rep. No. 209, 62d Cong., 2d Sess. at 1-2 (1912); H.R. Rep. No. 315, 62d Cong., 2d Sess. at 2 (1912); 48 Cong. Rec. 2335 (1912); S. Rep. No. 727, 66th Cong., 3d Sess. at 2 (1921); H.R. Rep. No. 694, 67th Cong., 2d Sess. at 1, 3 (1922); S. Rep. No. 554, 67th Cong., 2d Sess. at 1, 3 (1922); H.R. Rep. No. 1117, 68th Cong., 2d Sess. at 1, 2 (1925); S. Rep. No. 1115, 68th Cong., 2d Sess. at 1, 2 (1925); H.R. Rep. No. 900, 70th Cong., 1st Sess. at 1, 2 (1928). Other extensions were included with extensions for homesteads on other opened lands, such as the Rosebud areas, which had been disestablished, and it is apparent that the various surplus lands acts involved were regarded as being generally

the same. See Act of March 26, 1910, 36 Stat. 265; Act of May 27, 1914, 38 Stat. 383; S. Rep. No. 406, 61st Cong., 2d Sess. at 2 (1910); 45 Cong. Rec. 2851-53 (1910); H.R. Rep. No. 546, 63d Cong., 2d Sess. at 1 (1914); 51 Cong. Rec. 8790-92 (1914).

Confirmation of the congressional intent to disestablish in the 1908 Act is found not only in the extension statutes but in other subsequent legislative materials which refer to the "diminished" or "reduced" reservations. See S. Rep. No. 819, 60th Cong., 2d Sess. at 1, 2 (1909); H.R. Rep. No. 2099, 60th Cong., 2d Sess. at 1, 2 (1909); S. Rep. No. 100, 61st Cong., 2d Sess. at 1, 2 (1910); S. Rep. No. 591, 61st Cong., 2d Sess. at 4 (1910); S. Rep. No. 518, 61st Cong., 2d Sess. at 4 (1910); S. Rep. No. 216, 62d Cong., 2d Sess. at 3 (1912); H.R. Rep. No. 637, 62 Cong., 2d Sess. at 7, 9 (1912). See also 45 Cong. Rec. 5799, 5808 (1910) (1908 Act "similar" and "identical" to 1907 Rosebud Act). For example, in 1913,

Congress provided for the opening of the remainder of the Standing Rock Reservation left unopened by the 1908 Act. Act of February 14, 1913, 37 Stat. 675.[11] The legislative history to this statute shows that the acreage left unopened by the 1908 Act was thought by Congress to constitute "the entire reservation" and "all of the remaining lands on this reservation." S. Rep. No. 217, 62d Cong., 2d Sess. at 1 (1912); 48 Cong. Rec. 1475 (1912) (Remarks of Senator Gamble). The materials also contain references to "the diminished reservation" and the "former boundaries." H.R. Rep. No. 637, supra, at 7, 9.

These subsequent legislative references demonstrate that Congress understood that the

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11. The effect of this statute is not at issue in this case. However, it is the position of the amici counties that the 1913 Act also had the effect of disestablishment, and that the decision in United States v. Long Elk, 565 F.2d 1032 (8th Cir. 1977), which the court below has used for support of its decisions regarding the 1908 Act, is incorrect.

1908 Act disestablished the portions of the two reservations opened to settlement. Thus, they stand as persuasive evidence as to the perceived intent of the 1908 Act. Moreover, as is explained below, the understanding of Congress was shared by the other branches of government.

B. Subsequent Jurisdictional History

It is well established that the subsequent jurisdictional history of an area ought to be considered in determining whether the reservation status of that area has been terminated. See, e.g., Rosebud Sioux Tribe v. Kneip, 430 U.S. at 603-05; DeCoteau v. District County Court, 420 U.S. at 442. In this case, the jurisdictional history of the opened areas establishes a long-standing pattern of understanding on the part of the United States, state and local governments, and the Courts, that the area was disestablished and that jurisdiction over non-Indian lands in the area was consequently

transferred to the States and their subdivisions.

1. The Assumption of State Jurisdiction

As the District Court noted in United States v. A Juvenile, 453 F. Supp. at 1199, the evidence indicates that the State assumed civil and criminal jurisdiction over the opened portion of the original Cheyenne River Reservation shortly after the opening in 1910 and continued to exercise jurisdiction without interruption in that area for over sixty years, until the District Court decision in United States ex rel. Condon v. Erickson, 344 F. Supp. 777 (1972).[12] See also Transcript of Hearing 11-17, United States v. A Juvenile (January 9, 1978) (included in designated record for

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12. Although the exercise of state jurisdiction resumed after the 1977 decision in Stankey v. Waddell, 256 N.W.2d 117 (S.D.), resulting in prosecutions such as that underlying the instant case, state prosecutions were later largely suspended as the jurisdictional situation remained in doubt.

the Court of Appeals in the instant case); United States v. Dupris, 612 F.2d 319, 338-39 (McMillian, J., dissenting); State v. Barnes, 81 S.D. 511, 137 N.W.2d 683 (1965); Lafferty ex rel. State v. Jameson, 80 S.D. 411, 125 N.W.2d 171 (1963); State v. Sauter, 48 S.D. 409, 205 N.W. 25 (1925).

Following the 1911 decision of the District Court in United States v. La Plant, 200 F. 92 (D.S.D.), the United States acquiesced in the assumption of jurisdiction of the state. See e.g., [1911] Annual Report of Cheyenne River Agency, § 1, nos. 3 & 12 (Doc. No. 12, Appendix C to the Brief of the Counties of Dewey, et al., Bartlett v. Solem, 691 F.2d 420 (8th Cir. 1982))[13]; Transcript

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13. A copy of this Appendix, which was before the court below but was not a part of the official record, has been lodged with the Court. Part C of the Appendix contains a number of pertinent federal agency documents from the National Archives which had not otherwise been made available to the court below. It is hereinafter cited as "Counties Ct. App. Appendix."

of Hearing, supra, at 25-26. The consistent exercise of State jurisdiction was recently recognized by the United States in its Brief in the Court of Appeals in United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973) (Amici App. D1-D33). Contrary to the position which it has espoused in this case, the United States in Erickson strenuously argued that the opened area was disestablished and that disestablishment intent is "clear from the provisions of the 1908 Act." Amici App. at D7. The United States further stated:

> The construction of the Act of 1908 by the court in LaPlant has been followed by the State of South Dakota and the Government for a period of about 71 years.
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> . . . .
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> . . . .
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> The history of city and state law enforcement in Eagle Butte has been based on the earlier decisions. To now add this area to Federal jurisdiction would not, in our opinion, be a proper move. . . .

Amici App. at D10-D11.

The long-standing assumption of jurisdiction by the state, unchallenged by the federal government until relatively recent years, is indicative of the accepted understanding of the meaning of the 1908 Act and is further confirmation that the Act had disestablishment effect. See Rosebud, 430 U.S. at 603-04. Cf. DeCoteau v. District County Court, 420 U.S. at 443-44.

2. Treatment of the Area by Federal Agencies

The treatment of the area in question by the federal officials responsible for the administration of Indian affairs and Indian lands in the years following the opening, leaves no doubt that these officials understood that the boundaries of the Cheyenne River Reservation had been altered by the opening. Numerous administrative documents refer to the opened area as the "former" reservation or as "ceded" lands, and describe the remaining area as the "diminished

reservation."[14] See Counties Ct. App. Appendix B.[15] In one particularly explicit

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14. The Respondent apparently deems it significant that officials occasionally referred to the opened area, together with the closed area, as "the reservation," without any qualifying adjective. Brief of Respondent in Opposition to Petition at 12. Some such references were made before the lands were opened, and when they remained, for all practical purposes, in reservation status. Other such references must be regarded simply as convenient geographical designations of an area which had been in reservation status and in which there was still a substantial amount of Indian trust land. See United States v. Oklahoma Gas and Electric Co., 318 U.S. 206, 216 (1943). Indeed, as the District Court noted in A Juvenile, such references are difficult to avoid. 453 F. Supp. at 1198. To argue that such references are significant, in light of the many unambiguous references to the "former" reservation and the like, is to propose the unlikely scenario of perpetual confusion among Interior officials as to the status of the area. It should be noted that present tense references like that cited by Respondent were also made with respect to the disestablished Rosebud and Lake Traverse reservation areas. See, e.g., Brief of Petitioner, DeCoteau v. District County Court at 39-43.

15. Counties Ct. App. Appendix B is a table listing the relevant passages in three categories of documents which are

example, the Superintendent of the Cheyenne River Agency described both the boundaries of the Reservation "[p]rior to the opening," and the "boundaries of the present diminished reservation". Doc. No. 29, Appendix III to Brief for the Counties of Dewey, et al., United States v. Dupris, 612 F.2d 319 (8th Cir. 1979) (designated part of the record herein).

Of major significance are Orders of Restoration issued by the Secretary of the Interior pursuant to Sections 3 and 7 of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 463 & 467. Order of June 12, 1941, 6 Fed. Reg. 3300; Order of January 10, 1949, 14 Fed. Reg. 471; Order of January 21, 1952, 17 Fed. Reg. 1065-66; Order of May 17, 1957, 22 Fed. Reg. 3693; Order of December 13, 1965, 30 Fed. Reg. 15588; Order of October 9, 1967, 32 Fed.

(cont.)
explained at p. 17 of the Counties' brief in the court below. Those documents not reproduced in Part C of the Appendix were filed in United States v. Dupris and have been made part of the record herein.

Reg. 14276. See also Order of September 19, 1936, 1 Fed. Reg. 1503 (Standing Rock). These Orders restored opened but unsold lands to tribal ownership under Section 3 of the 1934 Act (25 U.S.C. § 463), and declared the land to be "added to and made a part of the existing reservation" under Section 7 of the Act (25 U.S.C. § 467).[16] Obviously, it would have been entirely superfluous to add the unsold lands to the Cheyenne River reservation if they had never ceased to be part of it. Therefore, these Orders unmistakably reflect the understanding of the Secretary that the opened lands were no longer part of the reservation following the opening. United States v. A Juvenile, 453 F. Supp. at 1194; Stankey v. Waddell, 256 N.W.2d 117, 127 (S.D. 1977).

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16. All of the Orders explicitly refer to Section 7, and all but the 1949 and 1965 Orders contain the quoted language of restoration to reservation status.

Also significant is the cartographic record of the area in question following the opening. See DeCoteau v. District County Court, 420 U.S. at 442; United States ex rel. Cook v. Parkinson, 396 F. Supp. 473, 497-99 (D.S.D.), aff'd, 525 F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977). Thus, some maps plainly delineate the boundary between "Ceded Land" and the "Diminished Res[ervation]." Office of Indian Affairs, Maps of Cheyenne River Reservation, 1910 and 1919 [revised 1940]; Roads Division, Plat Map for Five Year Road Plan, 1938; Office of Indian Affairs, Map of Standing Rock Reservation, c. 1910 (certified copies of these maps from the National Archives have been lodged with the Court as Maps No. 1-4). Other maps identify the opened areas of the Cheyenne River and Standing Rock Reservation, as well as the other opened lands in South Dakota, as "Former Indian Reservations," or simply fail to include the opened area as part of the existing

reservation. Office of Indian Affairs Maps of Indian Reservations, 1919 and 1923; General Land Office Map of South Dakota, 1918 (Maps No. 5-7).

Thus, at least from 1908 to 1972, the interpretation placed on the 1908 Act by officials of the Department of the Interior was that the Act had resulted in disestablishment. This consistent, long-standing interpretation of the effect of a statute by the governmental agency responsible for its implementation is entitled to great deference, and should not be disregarded in the absence of compelling evidence to the contrary. See, e.g., E.P.A. v. National Crushed Stone Assn., 449 U.S. 64, 83 (1980); United States v. National Association of Securities Dealers, Inc., 422 U.S. 694, 718-19 (1975); Leary v. United States, 395 U.S. 6, 25 (1969). This is especially true of those examples of administrative construction which are contemporaneous with the passage of the

Act. See, e.g., Andrus v. Shell Oil Co., 446 U.S. 651, 667-68 (1980); Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978).

To be sure, there has been a continued federal presence in the opened lands. However, the continuing administration of Indian affairs and the exercise of federal jurisdiction over Indian lands in no way signifies a continuation of reservation status, but instead flows from the federal government's supervisory authority for the welfare of Indians.[17] See, e.g., Rosebud, 430 U.S. at 615 n.48; DeCoteau, 420 U.S. at 442-43; United States v. Pelican, 232 U.S. 442, 449 (1914); United States v. A Juvenile, 453 F. Supp. at 1176, 1200-01. Moreover, trust allotments and tribal lands which have been restored to reservation status are unquestionably "Indian country" and subject

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17. It must also be remembered that the 1910 liquor amendment conferred federal jurisdiction over liquor traffic throughout the opened area for 25 years.

to federal jurisdiction. 18 U.S.C. §§ 1151(a) & (c). In addition, the opened area has always included substantial Indian lands -- both unsold surplus land and Indian allotments -- which have been administered by the federal government in its capacity as trustee. See Ash Sheep Co. v. United States, 252 U.S. 159 (1920); United States v. Pelican at 449; A Juvenile at 1200. In short, the opened Cheyenne River lands do not materially differ in this respect from the disestablished areas considered by this Court in Rosebud and DeCoteau. See Brief for Tribe 65-66, Rosebud; Brief for United States 22-26, DeCoteau.

In short, the jurisdictional history of the opened lands is very similar to that presented in Rosebud, and the statement of the Court in that case has equal applicability here:

> [T]he fact that neither Congress nor the Department of Indian Affairs has sought to exercise its authority over this area, or to challenge the State's exercise of authority is a factor entitled to weight as part of the "jurisdictional history." 430 U.S. 604.

3. Subsequent Judicial History

The subsequent treatment of the opened area by federal and state courts bolsters the conclusion that the 1908 Act was intended to reduce the boundaries of the Cheyenne River Reservation. In 1911, shortly after the area had been opened by presidential proclamation, the federal District Court held that the Act had the effect of diminishing the boundaries of the Cheyenne River Reservation by excluding the area opened to settlement, and that the area was therefore within the jurisdiction of the State. United States v. LaPlant, 200 F.

92, 93-94 (D.S.D. 1911).[18] This holding was reaffirmed in a series of opinions of the Supreme Court of South Dakota. State v. Barnes, 81 S.D. 511, 137 N.W.2d 683 (1965); Lafferty ex rel. State v. Jameson, 80 S.D. 411, 125 N.W.2d 171 (1963); State v. Sauter, 48 S.D. 409, 205 N.W. 25 (1925). Furthermore, the disestablishment effect of the 1908 Act is recognized in two subsequent decisions of the District Court. United States v. Dewey County, 14 F.2d 784, 785, 789 (D.S.D. 1926), aff'd on other grounds, 26 F.2d 434 (8th Cir. 1928) ("old" reservation - "diminished portions"); United States v. Pearson, 231 F.

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18. LaPlant was cited with approval in two subsequent decisions of the Eighth Circuit. Beardslee v. United States, 387 F.2d 280, 286 (8th Cir. 1967); Kills Plenty v. United States, 133 F.2d 292, 294 (8th Cir.), cert. denied, 319 U.S. 759 (1943). In Putnam v. United States, 248 F.2d 292, 295 (8th Cir. 1952), the court held that LaPlant was not valid precedent for the assertion that an Indian allotment in a former reservation area was part of the public domain, but did not question the basic holding of LaPlant.

270, 271 (D.S.D. 1916) ("former" reservation").

The courts consistently treated the opened Cheyenne River lands as disestablished until 1970, when one judge of the Eighth Circuit made the suggestion, in a dissenting opinion, that the area had not been disestablished. United States ex rel. Miner v. Erickson, 428 F.2d 623, 627 n.11 (8th Cir. 1970) (Lay, J., dissenting). Two years later, a judge of the District Court agreed. United States ex rel. Condon v. Erickson, 344 F. Supp. 777 (D.S.D. 1972). The Eighth Circuit affirmed, effectively reversing the previously established precedent. United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973).

However, the state Supreme Court has continued to hold that the 1908 Act disestablished the affected portion of the reservation. Stankey v. Waddell, 256 N.W.2d 117 (S.D. 1977); State v. Janis, 317 N.W.2d

133 (S.D. 1982). Although the District Court re-examined the question and held that the Act did have disestablishment effect, United States v. A Juvenile, 453 F. Supp. 1171 (D.S.D. 1978), the Eighth Circuit adhered to its earlier decision in Erickson and reversed the District Court over a dissent by Judge McMillian. United States v. Dupris, 612 F.2d 319 (8th Cir. 1979). That judgment was later vacated by this Court, 446 U.S. 980 (1980), and the Eighth Circuit, in a split en banc decision, reaffirmed Erickson and Dupris in the instant case.[19]

It is apparent from the above discussion that until the decisions in Erickson, there had been over sixty years of consistent judicial precedent affirming the disestablishment of the opened area and the assumption of jurisdiction by the state. Cf.

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19. Two of the seven judges of the Court dissented, believing that Erickson required modification in light of Rosebud and DeCoteau.

DeCoteau, 420 U.S. at 449. This presumption of the courts was shared by the Executive Branch and Congress and thus carries considerable weight. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978). As in Rosebud, this commonly shared presumption "has created justifiable expectations which should not be upset by so strained a reading" of the 1908 Act as urged by Respondent.

CONCLUSION

This Court has cautioned more than once that the determination of questions such as that presented here cannot rest on present-day conceptions of the wisdom of past legislative decisions, but that the focus instead is on legislative intent at the time the statute in question was passed. Rosebud Sioux Tribe v. Kneip, 430 U.S. at 615, DeCoteau v. District County Court, 420 U.S. at 449. When the available relevant materials are viewed from the proper historical perspective,

and in light of the decisions of this Court, the only reasonable conclusion that can be drawn is that Congress intended to disestablish the area opened under the 1908 Cheyenne River Act.

Dated this 4th day of August, 1983.

Respectfully submitted,

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APPENDICES

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COMPARISON OF PERTINENT PROVISIONS OF 1908 CHEYENNE RIVER ACT AND 1907 AND 1910 ROSEBUD ACTS

Act of May 29, 1908, ch. 218, 35 Stat. 460	Act of Mar. 2, 1907, ch. 2536, 34 Stat. 1230	Act of May 30, 1910, ch. 260, 36 Stat. 448
An Act To authorize the sale and disposition of a portion of the surplus and unallotted lands in the Cheyenne River and Standing Rock Indian reservations in the States of South Dakota and North Dakota, and making appropriation and provision to carry the same into effect.	An Act To Authorize the sale and disposition of a portion of the surplus or unallotted lands in the Rosebud Indian Reservation, in the State of South Dakota, and making appropriation and provision to carry the same into effect.	An Act To authorize the sale and disposition of a portion of the surplus and unallotted lands in Mellette and Washabaugh counties in the Rosebud Indian Reservation in the State of South Dakota, and making appropriation and provision to carry the same into effect.

[Sec. 1] That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell and dispose of all that portion of the Cheyenne River and Standing Rock Indian reservations in the States of South Dakota and North Dakota lying and being within the following described boundaries, to-wit: . . . except such portions thereof as have been allotted to Indians. . . .

[Sec. 1] That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell or dispose of all that portion of the Rosebud Indian Reservation in South Dakota lying south of the Big White River and east of range twenty-five west of the sixth principal meridian, except such portions thereof as have been, or may hereafter be, allotted to Indians . . . .

[Sec. 1] That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell and dispose of all that portion of the Rosebud Indian Reservation, in the State of South Dakota, lying and being within the counties of Mellette and Washabaugh, south of the White River, and being described and bounded as follows: . . . . except such portions thereof as have been or may be hereafter allotted to Indians or otherwise reserved, and except lands classified as timber lands . . . .

[Sec. 1] . . . Provided, That sections sixteen and thir y six of the lands in each township therein shall not be disposed of, but shall be reserved for the use of the common schools of the States of South Dakota and North Dakota, as the same may be located in the said States, respectively. . . .

[Sec. 1] Provided, That sections sixteen and thirty-six of the lands in each township shall not be disposed of, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose.

[Sec. 1] . . . Provided further, That the Secretary of the Interior may reserve such lands as he may deem necessary for agency, school, and religious purposes, to remain reserved as long as needed, and as long as agency, school, or religious

[Sec. 1] . . . And provided further, That the Secretary of the Interior may reserve such lands as he may deem necessary for agency, school, and religious purposes, to remain reserved as long as needed and as long as agency, school, or

institutions are maintained thereon for the benefit of said Indians. . . .

Sec. 2. That the lands shall be disposed of by proclamation under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which the lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to

Sec. 2. That the land shall be disposed of by proclamation, under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to

religious institutions are maintained thereon for the benefit of said Indians. . . .

Sec. 2. That the lands shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which the lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon,

settle upon, occupy, or enter any of said lands except as prescribed in such proclamation. . . .

Sec. 2. . . . Provided, That prior to the said proclamation the Secretary of the Interior, in his discretion, may permit Indians who have an allotment within the area described in section one of this Act to relinquish such allotment and to receive in lieu thereof an allotment anywhere within the respective reservations thus diminished to which reservation the said Indians may belong. . . .

settle upon, occupy, or enter any of said lands except as prescribed in such proclamation. . . .

Sec. 2. . . .Provided, That prior to the said proclamation the Secretary of the Interior, in his discretion, may permit Indians who have an allotment within the Rosebud Reservation to relinquish such allotment and to receive in lieu thereof an allotment anywhere within said reservation. . . .

. . . .

occupy, or enter any of said lands except as prescribed in such proclamation. . . .

[Sec. 1] . . . Provided, That any Indians to whom allotments have been made on the tract to be ceded may, in case they elect to do so before said lands are offered for sale, relinquish same and select allotments in lieu thereof on the diminished reservation . . . .

Sec. 2. . . . Provided further, That prior to the said proclamation the Secretary of the Interior shall cause allotments to be made to every man, woman, and child belonging to or holding tribal relations in said Cheyenne River and Standing Rock reservations who have not heretofore received the allotments to which they are entitled under provisions of existing laws. . . .

Sec. 2 . . . Provided further, That the Secretary of the Interior be, and he is hereby,

Sec. 2. . . . Provided, That prior to said proclamation the allotments within the portion of the said Rosebud Reservation to be disposed of as prescribed herein shall have been completed. . . .

authorized and directed to cause to be surveyed all the lands embraced within said reservations, and to cause an examination to be made of the lands by experts of the Geological Survey, and if there be found any lands bearing coal, the said Secretary is hereby authorized to reserve them from allotment or disposition until further action by Congress. . . .

Sec. 3. That the price of said lands entered as homesteads under the provisions of this Act shall be

Sec. 3. That the price of said lands entered as homesteads under the provisions of this Act shall be

Sec. 4. That the price of said lands entered as homesteads under the provisions of this Act shall be

fixed by appraisement as herein provided. The President of the United States shall appoint two commissions, one for each reservation, each commission to consist of three persons to inspect, appraise, and value all of said lands that shall not have been allotted in severalty to said Indians, or reserved by the Secretary of the Interior or otherwise disposed of, and excepting sections sixteen and thirty-six in each of said townships. . . .That said commissioners shall then proceed to personally inspect, classify, and appraise, in one

as follows: Upon all land entered or filed upon within three months after the same shall be opened for settlement and entry, six dollars per acre, and upon all land entered or filed upon after the expiration of three months and within six months after the same shall have opened for settlement and entry, four dollars and fifty cents per acre; after the expiration of six months after the same shall have been opened for settlement and entry the price shall be two dollars and fifty cents per acre. . . .

fixed by appraisement, as herein provided. The President shall appoint a commission to consist of three persons to classify, appraise, and value all of said lands that shall not have been alloted in severalty to said Indians, or reserved by the Secretary of the Interior or otherwise disposed of, and excepting sections sixteen and thirty-six or other lands which may be selected in lieu thereof by the State of South Dakota, in each of said townships. . . . The said commissioners shall then proceed to personally inspect, classify, and appraise,

hundred and sixty acre tracts each, all of the remaining lands embraced within each reservation as described in section one of this Act. In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, grazing land; fourth, timber land; fifth, mineral land, if any, the mineral land not to be appraised.

in one hundred and sixty acre tracts each, all of the remaining unallotted lands embraced within that portion of the reservation described in section one of this Act. In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, grazing land; fourth, timber land; fifth, mineral land, if any, but the mineral and timber lands shall not be appraised: Provided, That timber lands may be

Sec. 4. That the price of said lands shall be paid in accordance with the rules and regulations to be prescribed by the Secretary of the Interior upon the following terms: One fifth of the purchase price to be paid in cash at the time of entry, and the balance in five equal annual installments, to be paid in one, two, three, four,

Sec. 3. . . . The price shall be paid in accordance with rules and regulations to be prescribed by the Secretary of the Interior upon the following terms: One-fifth of the purchase price to be paid in cash at the time of entry, and the balance in five equal annual installments, to be paid in one, two, three, four, and five years,

classified without regard to acreage: And provided further, That all lands classified as timber lands shall be reserved for the use of the Rosebud Indians. . . .

Sec. 6. That the price of said lands disposed of under the homestead laws shall be paid in accordance with rules and regulations to be prescribed by the Secretary of the Interior upon the following terms: One-fifth of the purchase price to be paid in cash at the time of entry and the balance in five equal annual installments, to be

and five years, respectively, from and after the date of entry.

Sec. 4. . . . And provided further, That all lands remaining undisposed of at the expiration of four years from the opening of said lands to entry may, in the discretion of the Secretary of the Interior, be reappraised in the manner provided for in this Act. And it is further provided that any lands remaining unsold after said lands have been open to entry for seven years may be sold to the highest bidder for

respectively, from and after the date of entry.

Sec. 3. . . . And provided further, That all lands remaining undisposed of at the expiration of four years from the opening of the said lands to entry shall be sold to the highest bidder for cash at not less than two dollars and fifty cents per acre, under rules and regulations to be prescribed by the Secretary of the Interior, and that any lands remaining unsold after the said lands have been opened to entry for seven

paid in two, three four, five, and six years, respectively, from and after the date of entry.

Sec. 6. . . .And provided further, That all lands remaining undisposed of at the expiration of four years from the opening of said lands to entry may, in the discretion of the Secretary of the Interior, be reappraised in the manner provided for in this Act.

cash without regard to the prescribed price thereof fixed under the provisions of this Act, under such rules and regulations as the Secretary of the Interior may prescribe.

Sec. 5. That the Secretary of the Interior is authorized to reserve from said lands such tracts for townsite purposes as in his opinion may be required for the future public interests, and he may cause the same to be surveyed into blocks and lots and disposed of under such regulations as he may prescribe. . . . The net proceeds derived from the sale of such

years may be sold to the highest bidder for cash, without regard to the above minimum limit of price.

Sec. 4. That the Secretary of the Interior is authorized to reserve from said lands such tracts for town-site purposes as in his opinion may be required for the future public interests, and he may cause the same to be surveyed into blocks and lots and disposed of under such regulations as he may prescribe. . . . The net proceeds derived from the sale of such

Sec. 3. . . . [T]he Secretary of the Interior is authorized to reserve from said lands such tracts for town-site purposes as in his opinion may be required for the future public interests, and he may cause same to be surveyed into lots and blocks and disposed of under such regulations as he may prescribe. . . .The net proceeds derived from the sale of such

lands shall be credited to the Indians as hereinafter provided.

Sec. 6. That from the proceeds arising from the sale and disposition of the lands aforesaid, exclusive of the customary fees and commissions, there shall be deposited in the Treasury of the United States, to the credit of the Indians belonging and having tribal rights on the

lands shall be credited to the Indians as hereinafter provided.

Sec. 5. That from the proceeds arising from the sale and disposition of the lands aforesaid, exclusive of the customary fees and commissions, there shall be deposited in the Treasury of the United States, to the credit of the Indians belonging and having tribal rights on the

lots and lands within the townsites as aforesaid, less the amount set aside to aid in the construction of schoolhouses or other public buildings or improvements, shall be credited to the Indians, as hereinafter provided.

Sec. 7. That from the proceeds arising from the sale and disposition of the lands aforesaid, exclusive of the customary fees and commissions, there shall be deposited in the Treasury of the United States, to the credit of the Indians belonging and having tribal rights on the said

reservations aforesaid in the States of South Dakota and North Dakota the sums to which the respective tribes may be entitled, which shall draw interest at three per centum per annum; that the moneys derived from the sale of said lands and deposited in the Treasury of the United States to the credit of said Indians respectively shall be expended for their benefit under the direction of the Secretary of the Interior.

Rosebud Reservation, in the State of South Dakota, the sum of one million dollars, which shall draw interest at three per centum per annum for ten years, the interest to be paid to the Indians per capita in cash annually, share and share alike; that at the expiration of ten years, after one million dollars shall have been deposited as aforesaid, the said sum shall be distributed and paid to said Indians per capita in cash; that the balance of the proceeds arising from the sale and disposition of the lands as aforesaid shall be deposited in

reservation, the sums to which the said tribe may be entitled, which shall draw interest at three per centum per annum; that the moneys derived from the sale of said lands and deposited in the Treasury of the United States to the credit of said Indians shall be at all times subject to appropriation by Congress for their education, support, and civilization.

the Treasury of the United States to the credit of said Indians and shall be expended for their benefit under the direction of the Secretary of the Interior. . . .

Sec. 7. That sections sixteen and thirty-six of the land in each township within the tract described in section one of this Act shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at one dollar and twenty-five cents per acre, and the same are hereby granted to the States of

Sec. 6. That sections sixteen and thirty-six of the lands in each township within the tract described in section one of this Act shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South

Sec. 8. That sections sixteen and thirty-six of the land in each township within the tract described in section one of this Act shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South

South Dakota and North Dakota for such purpose as the same are located in the said States respectively; and in case any of said sections, or parts thereof, are lost to said States by reason of allotments thereof to any Indian or Indians, or otherwise, the governors of said States, respectively, with the approval of the Secretary of the Interior, are hereby authorized, within the area in the respective States described in section one of this Act, to locate other lands not occupied. . . .

Dakota for such purpose; and in case any of said sections, or parts thereof, are lost to said State of South Dakota by reason of allotments thereof to any Indian or Indians, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, within the tract described herein, to locate other lands not occupied. . . .

Dakota for such purpose, and in case any of said sections, or parts thereof, are lost to said State by reason of allotments thereof to any Indian or Indians, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, within the area described in section one of this Act, to locate other lands not otherwise appropriated . . . .

[As amended by Act of February 17, 1910, ch. 40, 36 Stat. 196]:

Sec. 8. . . . . And provided further, That the lands allotted, those retained or reserved, and the surplus lands sold, set aside for town-site purposes, or granted to the said States, or otherwise disposed of under the provisions of this Act, shall be subject for a period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country.

Sec. 10. That the lands allotted, those retained or reserved, and the surplus land sold, set aside for town-site purposes, granted to the State of South Dakota, or otherwise disposed of, shall be subject for a period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country.

Sec. 9. That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of the said lands and to expend and pay over the proceeds received from the sale

Sec. 8. That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale

Sec. 11. That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six, or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of the said lands, and to expend and pay over the proceeds received from the sale

thereof only as received and as herein provided: Provided, That nothing in this Act shall be construed to deprive the said Indians of the Cheyenne River or Standing Rock Indian reservations, in South Dakota and North Dakota, of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this Act. . . .

thereof only as received, as herein provided: Provided, That nothing in this Act shall be construed to deprive the said Indians of the Rosebud Reservation, in South Dakota, of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this Act.

thereof only as received and as herein provided: Provided, That nothing in this Act shall be construed to deprive the said Indians of the Rosebud Indian Reservation of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this Act.

Provided, That Indians residing upon their allotments in townships sixteen north of ranges twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty, and thirty-one east shall have the right to use timber in said townships, except on sections sixteen and thirty-six for domestic purposes only as long as the lands remain part of the public domain.

CONGRESSIONAL DEBATE OF 1908
CHEYENNE RIVER LEGISLATION

42 Cong. Rec. 4753-55 (Senate, April 15, 1908)

LANDS IN SOUTH DAKOTA

The bill (S. 1385) to authorize the sale and disposition of a portion of the surplus and unallotted lands in the Cheyenne River and Standing Rock Indian reservations, in the State of South Dakota, and making appropriation and provision to carry the same into effect, was considered as in Committee of the Whole.

The bill was reported from the Committee on Indian Affairs with amendments.

The first amendment was, in section 1, line 6, to strike out the word "State" and insert "States," and in line 7, after the words "South Dakota," to insert "and North Dakota" so as to read:

That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell and dispose of all that portion of the Cheyenne River and Standing Rock Indian reservations in the States of South Dakota and North Dakota.

The amendment was agreed to.

The next amendment was, on page 1, line 7, after the word "the," to strike out the words "county of Schnasse, in said state," and insert:

Following-described boundaries, to wit: Beginning at a point in the center of the main channel of the Cheyenne River on the southern boundary of the Cheyenne River Indian Reservation, in the State of South Dakota, where the range line between ranges 23 and 24 east of the Black Hills meridian intersects the same; thence north on said range line to a point where the same intersects

the township line between townships 15 and 16 north; thence east along said township line to a point in the center of the main channel of the Missouri River, thence in a northerly direction along the center of the main channel of said Missouri River to a point where the township line between townships 18 and 19 north intersects the same, and including also entirely all islands, if any, in said river; thence west on said township line to a point where the range line between said ranges 23 and 24 intersects the same; thence north along said range line to the State line between the States of South Dakota and North Dakota; thence west on said State line to a point where the range line between ranges 84 and 85 west in North Dakota intersects the same; thence north on said range line to a point where said range line intersects the center of the main channel of the South Fork of the Cannon Ball River; thence in a westerly direction up and along the center of the main channel of the said river to a point where the same intersects the one hundred and second meridian of longitude; thence south along said one hundred and second meridian of longitude to a point where the same intersects the center of the main channel of the Cheyenne River; thence in a northeasterly direction along the center of the main channel of said Cheyenne River to place of beginning.

Mr. GAMBLE. Mr. President, I submit a substitute for the committee amendment.

The VICE-PRESIDENT. The amendment to the amendment will be stated.

The Secretary. In lieu of the committee amendment striking out the words "county of Schnasse, in said State," and inserting certain other words, it is proposed to insert the following:

Following-described boundaries, to wit: Beginning at a point on the one hundred and second meridian of longitude west, where the township line between townships 9 and 10 north intersects the same; thence east on said township line to a point where the same intersects the range line between ranges 24 and 25 east of the Black Hills meridian; thence north on said range line to a point where the same intersects the township line between townships 15 and 16 north; thence east along said township line to a point in the center of the main channel of the Missouri River; thence in a northerly direction along the center of the main channel of said Missouri River to a point where the towship line between townships 18 and 19 north intersects the same, and including also, entirely, all islands, if any, in said river: thence west on said township line to a point where the range line between ranges 22 and 23 east intersects the same; thence north along said range line to the northwest corner of section 19, in township 21 north, of range 23 east; thence east on the section line north of sections 19, 20, 21, 22, 23, and 24 to a point where the same intersects the range line between ranges 23 and 24 east; thence north along said range line to the State line between the States of South Dakota and North Dakota; thence west on said State line to a point where the range line between ranges 84 and 85 west, in North Dakota, intersects the same; thence north on said range line to a point where said range line intersects the center of the main channel of the South Fork of the Cannon Ball River; thence in a westerly direction up and along the center of the main channel of the said river to a point where the same intersects the one hundred and second meridian of longitude west; thence south along said one hundred and second meridian of longitude west to the place of beginning.

The amendment to the amendment was agreed to.

The amendment as amended was agreed to.

The next amendment of the Committee on Indian Affairs was, in section 1, page 3, line 8, to strike out "State," and insert "States," and in line 9, after the words "South Dakota," to insert "and North Dakota, as the same

may be located in the said States, respectively;" so as to make the proviso read:

Provided, That sections 16 and 36 of the lands in each township therein shall not be disposed of, but shall be reserved for the use of the common schools of the States of South Dakota and North Dakota, as the same may be located in the said States, respectively.

The amendment was agreed to.

The next amendment was, in section 2, page 3, line 22, to strike out the words, "said county of Schnasse" and insert "area described in section 1 of this act."

The amendment was agreed to.

The next amendment was, in section 2, page 4, line 7, to strike out the words "boundaries of Schnasse County, S. Dak." and insert "area described in section 1 of this act."

The amendment was agreed to.

The next amendment was to insert on page 4, line 10 after the word "laws," the following proviso:

Provided further, That the Secretary of the Interior be, and he is hereby, authorized and directed to cause to be surveyed all the lands embraced within said reservations, and to cause an examination to be made of the lands by experts of the Geological Survey, and if there be found any lands bearing coal, the said Secretary is hereby authorized to reserve them from allotment or disposition under the homestead laws, to be disposed of in accordance with the coal-land laws of the United States for the benefit of the tribes in common.

The amendment was agreed to.

The next amendment was, in section 3, page 5, line 4, to strike out the words "a commission consisting" and insert "two commissions, one for each reservation, each commission to consist;" in line 10 to strike out "said" and

insert "each" before "commission;" in line 13 to strike out the words "or the other;" and in line 14, after the word "Indians," to strike out the following words:

And the said commissioner last named shall act thereon while the appraisement and classification of the lands is made on the particular reservation to which he belongs, and when the appriasement and classification of the lands is completed on the reservation to which said last-named commissioner belongs another commissioner with like qualification shall be appointed, with like power, to act with the other members of said commission to appraise and classify the lands herein granted on the other reservation.

So as to read:

That the price of said lands entered as homesteads under the provisions of this act shall be fixed by appraisement as herein provided. The President of the United States shall appoint two commissions, one for each reservation, each commission to consist of three persons to inspect, appraise, and value all of said lands that shall not have been allotted in severalty to said Indians, or reserved by the Secretary of the Interior, or otherwise disposed of, and excepting sections 16 and 36 in each of said townships, each commission to be constituted as follows: One resident citizen of the State of South Dakota, one representative of the Indian bureau, and one person holding tribal relations with one of said tribes of Indians.

The amendment was agreed to.

The next amendment was, in section 3, page 5, line 23, after the word "appointment," to insert "the;" in line 24, after "commissioners," to insert "so appointed for each of the said reservations, respectively;" and in line 25, to strike out the words "said county of Schnasse," and insert "area described in section 1 of this act upon the reservations for which they were respectively appointed, and each commission shall," so as to read:

That within twenty days after their appointment the said commissioners so appointed for each of the said reservations, respectively, shall meet at some point within the area described in section 1 of this act upon the reservations for which they were respectively appointed, and each commission shall organize by the election of one of their number as chairman.

The amendment was agreed to.

The next amendment was, in section 3, page 6, line 4, before the word "commission," to strike out "Said" and insert "Each;" in line 5, to strike out "a clerk" and insert "such clerks and assistants as may be necessary;" and in line 7, after the word "day," to insert "subject to the approval of the Secretary of the Interior," so as to read:

Each commission is hereby empowered to select such clerks and assistants as may be necessary at a salary of not to exceed $5 perday subject to the approval of the Secretary of the Interior.

The amendment was agreed to.

The next amendment was, in section 3, page 6, line 9, after the word "appraise," to strike out "by the smallest legal subdivisions of 40 acres" and insert "in 160-acre tracts;" and in line 11, after the word "within," to strike out "the particular reservation first appraised, and after reorganization as above specified the said commission shall proceed to personally inspect, classify, and appriase as aforesaid all the remaining lands embraced within the other reservation hereby granted and conveyed" and insert "each reservation as described in section 1 of this act," so as to read:

That said commissioners shall then proceed to personally inspect, classify, and appriase, in 160-acre tracts each, all of the remaining lands embraced within each reservation as described in section 1 of this act.

The amendment was agreed to.

The next amendment was, in section 3, page 6, line 25, after the word "lands," to insert "and necessary expenses to be approved by the Secretary of the Interior;" on page 7, line 2, before the word "months," to strike out "four" and insert "six;" in line 3, to strike out "commission" and insert "commissions respectively;" and in line 4, to strike out "commission" and insert "commissions," so as to read:

In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, grazing land; fourth, timber land; fifth, mineral land, if any, the mineral land not to be appraised. That said commissioners shall be paid a salary of not to exceed $10 per day each while actually employed in the inspection and classification of said lands and necessary expenses to be approved by the Secretary of the Interior; such inspection and classification to be completed within six months from the date of the organization of said commissions respectively. That when said commissions shall have completed the classification and appraisement of all of said lands the same shall be subject to the approval of the Secretary of the Interior.

The amendment was agreed to.

The next amendment was, in section 4, on page 8, line 11, after the word "act," to insert:

And it is further provided that any lands remaining unsold after said lands have been open to entry for seven years may be sold to the highest bidder for cash without regard to the prescribed price thereof fixed under the provisions of this act, under such rules and regulations as the Secretary of the Interior may prescribe.

The amendment was agreed to.

The next amendment was, in section 6, page 9, line 6, after the words "in the," to strike out "State" and insert "States;" in the same line, after the name "South Dakota," to insert "and North Dakota;" in line 8, after the words "per annum," to strike out "for ten years," in line 10, after the word "alike," to strike out "that at the expiration of ten years the one-half of the amount so realized from the sale and disposition of the lands herein provided for and deposited as aforesaid to the credit of each of said tribes shall be distributed and paid to said Indians per capita respectively in cash; the balance thereof so," and insert "that the moneys derived from the sale of said lands and;" and in line 21, after the word "same," to insert "annually," so as to make the section read:

SEC. 6. That from the proceeds arising from the sale and disposition of the lands aforesaid, exclusive of the customary fees and commissions, there shall be deposited in the Treasury of the United States, to the credit of the Indians belonging and having tribal rights on the reservations aforesaid in the States of South Dakota and North Dakota as the respective tribes may be entitled to thereto, which shall draw interest at 3 per cent per annum, the interest to be paid to the Indians per capita in cash annually, share and share alike; that the moneys derived from the sale of said lands and deposited in the Treasury of the United States to the credit of said Indians respectively, shall be expended for their benefit under the direction of the Secretary of the Interior, and he may, in his discretion, upon an applicatin of a majority of the

Indians of either tribe, pay a portin of the same annually to the Indians so applying in cash, per capita, share and share alike, if, in his opinion, such payments will be for the best interests of said Indians.

The amendment was agreed to.

The next amendment was, in section 7, on page 10, line 5, after the word "at," to strike out "one dollar and twenty-five" and insert "two dollars and fifty;" in line 6, after the words "to the" to strike out "State" and insert "States;" in line 7, after the name "South Dakota," to insert "and North Dakota;" in line 8, after the word "purpose;" to insert "as the same are located in the said States, respectively;" in line 10, after the word "said," to strike out "State of South Dakota" and insert "States;" in line 11, after the word "the," to strike out "governor," and insert "governors;" in line 12, after the word "said," to strike out "State," and insert "States, respectively;" in line 13, before the word "hereby," to strike out "is" and insert "are;" in line 14, and after the word "the," to strike out "tract described herein" and insert "area in the respective States described in section 1 of this act," so as to make the section read:

SEC. 7. That sections 16 and 36 of the land in each township within the tract described in section 1 of this act shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at $2.50 per acre, and the same are hereby granted to the States of South Dakota and North Dakota for such purposes as the same are located in the said States, respectively: and in case any of said sections, or parts thereof, are lost to said States by reason of allotments thereof to any Indian or Indians, or otherwise, the governors of said States, respectively, with the approval of the Secretary of the Interior, are hereby

authorized, within the area in the respective States described in section 1 of this act, to locate other lands not occupied not exceeding two sections in any one township, which shall be paid for by the United States as herein provided, in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement.

The amendment was agreed to.

The next amendment was, in section 8, on page 10, line 22, before the word "thousand," to strike out "seventy-five" and insert "four hundred and fifteen;" in line 24, after the words "to the," to strike out "State" and insert "States;" in line 24, after the name "South Dakota," to insert "and North Dakota," and, on page 11, line 2, before the word "thousand," to strike out "twenty," and insert "seventy-five," so as to make the section read:

SEC. 8. That there is hereby appropriated out of any money in the Treasury not otherwise appropriated the sum of $415,000, or so much thereof as may be necessary, to pay for the lands granted to the States of South Dakota and North Dakota, as provided in section 7 of this act. And there is hereby appropriated the further sum of $75,000, or so much thereof as may be necessary, for the purpose of making the appraisement and classification and allotments provided for herein: Provided, That the same shall be reimbursed to the United States from the proceeds received from the sale of the lands described herein or from any money in the Treasury belonging to said Indian tribes respectively.

The amendment was agreed to.

Mr. GAMBLE. On page 11, line 5, I move to strike out the word "same," and insert in lieu thereof the words "latter appropriation."

The VICE-PRESIDENT. The amendment proposed by the Senator from South Dakota will be stated.

The SECRETARY. In section 8, page 11, line 5, before the word "shall," it is proposed to strike out the word "same," and to insert "latter appropriation," so that if amended it will read:

That the latter appropriation shall be reimbursed to the United States, etc.

The amendment was agreed to.

The next amendment of the Committee on Indian Affairs was, in section 9, page 11, line 21, after the name "South Dakota," to insert "and North Dakota," so as to make the proviso read:

Provided, That nothing in this act shall be construed to deprive the said Indians of the Cheyenne River or Standing Rock Indian Reservations in South Dakota and North Dakota, of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this act.

The amendment was agreed to.

Mr. GAMBLE. On page 11, line 23, after the word "act," I move to insert what I send to the desk.

The VICE-PRESIDENT. The amendment proposed by the Senator from South Dakota will be stated.

The SECRETARY. At the end of the bill it is proposed to insert:

Provided, That Indians residing upon their allotments in townships 16 north of ranges 25, 26, 27, 28, 29, 30, and 31 east shall have the right to use timber in said townships, except on sections 16 and 36, for domestic purposes only as long as the lands remain part of the public domain.

The amendment was agreed to.

The bill was reported to the Senate as amended, and the amendments were concurred in.

The bill was ordered to be engrossed the third reading, read the third time, and passed.

The title was amended so as to read: "A bill to authorize the sale and disposition of a portion of the surplus and unallotted lands in the Cheyenne River and Standing Rock Indian reservations, in the States of South Dakota and North Dakota, and making appropriation and provision to carry the same into effect."

42 Cong. Rec. 7003-07 (House, May 26, 1908)

OPENING CHEYENNE RIVER AND STANDING ROCK INDIAN RESERVATIONS.

Mr. SHERMAN. Mr. Speaker, I move to suspend the rules and pass Senate bill 1385, with the amendments that I present.

The Clerk read as follows:

[The text of the bill as passed by the Senate appears here.]

Mr. WILLIAMS. Mr. Speaker I ask for a second.

The SPEAKER. The gentleman from Mississippi demands a second; under the rule a second is ordered. The gentleman from New York (Mr. SHERMAN) is entitled to twenty minutes and the gentleman from Mississippi (Mr. WILLIAMS) is entitled to twenty minutes.

Mr. SHERMAN. Mr. Speaker, this bill opens a portion of the Cheyenne and Standing Rock reservations, in the States of South and North Dakota. The two

reservations contain about five and a quarter million acres, and the portion that is opened under this bill is about one-half of the two reservations. The reservations are to be opened by the proclamation of the President, but not until all of the Indians of the tribes upon the two reservations are fully allotted. There are of these Indians, in round numbers, about 6,000. Some of them already have been allotted, and to the balance allotments must be made under the general allotment act, which provides that 160 acres must be allotted to each head of a family, 80 acres to every minor over 18 years of age, the same amount to every minor under 18 years of age, provided the minor is an orphan, and 40 acres to each minor whose parents are living.

The bill also provides that surveys shall be made of both reservations before allotments are made; and also that, through the Secretary of the Interior, and by the proper officials of the Geological Survey, a survey shall be made to ascertain whether there be any coal deposits upon either reservation, it being believed by some that there are such valuable deposits; and if it be discovered there are such deposits, those lands are to be reserved from sale or disposal until some future action of Congress; in other words, shall be held in trust for the Indians.

The lands are very valuable. Civilization has come up to a point close to the reservation. One railroad has already been projected through the reservation and another one has reached the border on the east, and is ready to push the line through the reservation as soon as it opens up for settlement.

The amount of land that will be required to allot fully to all of the Indians will be, I should guess without analyzing the census of the Indians, as one can not get the figures exactly, in the neighborhood of 600,000 acres. So that of the amount still reserved from opening under this bill there will be nearly 2,000,000 acres of land, which can be used as general pasturelands and the like.

The land is to be appraised on each reservation by a separate commission appointed by the Secretary of the Interior. The commissions are to be made up of one enrolled member of the tribe — he may be full blood or partial blood — one representative of the Indian Office, and one citizen of either the State of North or South Dakota; in other words, a commission which is supposed to be best qualified to pass upon the value of the land.

Then the lands are to be sold at the appraised value, one-fifth of the purchase price to be paid in cash upon entry of the land, the other four-fifths in five equal annual payments. Whatever land is undisposed of at the end of four years is to be reappraised and then again offered for sale upon the same conditions as the land was originally offered for sale. Any land not disposed of at the end of seven years is to be offered for sale and disposed of to the highest bidder.

A provision is made for the reservation of so much of the land taken under this bill for disposal as the Secretary of the Interior may think is necessary to provide for future town sites, and it is to be surveyed, appraised, and disposed of in the manner that town sites are ordinarily disposed of.

The expense of carrying out all the provisions of this act are to be paid out of the appropriation made herein, but to be refunded to the Treasury of the United States from the proceeds of the lands sold; and the surplus arising from the sale of this land is to be deposited in the Treasury of the United States, to the credit of these Indians, to draw 3 per cent interest, and to be expended from time to time, not the principal, but the interest, for the benefit of these Indians in such manner as the Secretary of the Interior thinks proper.

Mr. FINLEY. Will the gentleman yield?

Mr. SHERMAN. Yes.

Mr. FINLEY. About what is the quality of the land to be disposed of.

Mr. SHERMAN. The quality is excellent.

Mr. FINLEY. Fine land, is it?

Mr. SHERMAN. It is good agricultural and grazing land. A very large percentage of it is agricultural land.

Mr. FINLEY. Worth about how much?

Mr. SHERMAN. Oh, it is difficult to say; it is worth, I should say, from $2.50 to $5.00 per acre.

Mr. FINLEY. Would not that be a very small valuation for excellent land?

Mr. SHERMAN. Well, it would be hard to tell if it would be worth a larger valuation, because you know a road has not yet gone through the part which is to be disposed of under this bill, and of course as you provide transportation through lands you make the property accessible and its value will increase.

That is a mere guess. Later on the gentleman from South Dakota [Mr. HALL] will occupy some time, and he perhaps can give a better idea of the value of the land per acre than I can.

Mr. FINLEY. I observe from reading the bill that one of the commissioners to be appointed is a person who has tribal relations. Does that mean an Indian agent?

Mr. SHERMAN. Oh no; it means an enrolled member of the tribe, but not necessarily one of full blood.

Mr. FINLEY. Would it mean an attorney?

Mr. SHERMAN. Oh, no; it means an enrolled member of the tribe, but not necessarily of full Indian blood.

Mr. FINLEY. This land is not arid, is it?

Mr. SHERMAN. Oh, no.

Mr. FINLEY. Nor semiarid?

Mr. SHERMAN. No; not arid land at all. Now the bill further provides for a transfer to the States of North and South Dakota of sections 16 and 36 in each township. The enabling act of those two States provided that the United States should eventually cede such sections to the States, respectively, for school purposes. We make appropriation herein for payment to the Indians for the land thus taken. That will amount to something like 160,000 acres.

Mr. WILLIAMS. How much per acre does it pay?

Mr. SHERMAN. One dollar and twenty-five cents per acre.

Mr. WILLIAMS. For sections 16 and 36?

Mr. SHERMAN. Yes; in each township.

Mr. WILLIAMS. Was there not an agreement with the Indians some time since to pay them $2.50 an acre?

Mr. SHERMAN. No; there was not exactly an agreement. An Indian agent has visited them, and they expect $2.50 an acre. They desire $2.50 an acre; that is correct.

Mr. HALL. He said he would recommend that.

Mr. SHERMAN. The agent who visited the Indians stated to them on the occasion of his visit that he would recommend the taking of sections 16 and 36 at $2.50 an acre. There was nothing like a regular agreement, but there was a general conference had to ascertain whether it was the desire of the Indians that these lands should be opened, and it was ascertained that that was the desire, and the agent said to the Indians that he would make this recommendation.

Mr. WILLIAMS. Does not the gentleman from New York think that, in view of that recommendation and in view of the fact that that probably entered into the willingness of the Indians to part with the land, and was a part of the consideration, this Government, which expends a good deal of money, could afford to pay these people $2.50 an acre?

Mr. SHERMAN. I have no doubt the United States Government could afford to pay these people $2.50 an acre.

Mr. WILLIAMS. Do not you think that it could afford to do it as a matter of justice and right?

Mr. SHERMAN. I think it is fair for us to take into consideration that our going in there and opening up

these lands and providing for their development, providing for the settlement of white citizens there, so enhances the value of the other lands that that should be considered as a part of the compensation for the land disposed of to the States.

Mr. WILLIAMS. Now, what will be the value of these lands, in the gentleman's estimation, after the railroads get there and the land is opened up and developed by railroad construction?

Mr. SHERMAN. Oh, I should suppose that eventually most of this land—

Mr. WILLIAMS. Good farming land is getting to be pretty scarce.

Mr. SHERMAN. Yes; I should suppose the greater part of this land before a very great length of time ought to be worth in the neighborhood of $10 an acre. Let me ask my friend from South Dakota if that is correct?

Mr. HALL. Yes.

Mr. WILLIAMS. The highest price we are going to get for them is $5?

Mr. SHERMAN. Oh, no; the land is to be appraised. In answer to somebody's question I said I thought perhaps the value of the land at the present time was anywhere from $2.50 to $5 an acre, but the land is to be appraised, and is to be sold at the appraised value.

Mr. WILLIAMS. By whom is it to be appraised?

Mr. SHERMAN. By commissions to be appointed by the Secretary of the Interior, those commissions on each reservation to consist of one member of the tribe, one official from the Indian Office, and one citizen of

the State of either North or South Dakota, in which the reservations are located.

Mr. WILLIAMS. Does the gentleman or does he not think if these lands were opened up upon what we call the Oklahoma plan, letting people go in and pay what the lands are worth, that they would be much more rapidly settled and the Indians would get very much more money?

Mr. SHERMAN. I would rather somebody who has had more experience than I in reference to such openings would answer that question. If the gentleman from Mississippi will permit me to ask the gentleman from South Dakota [Mr. Hall], who is more conversant than I, I would be very glad to do so.

Mr. WILLIAMS. I suppose the gentleman from South Dakota would not know nearly as much as would the gentleman from New York about what happened in Oklahoma, as the gentleman from New York was then on the Indian Affairs Committee.

Mr. HALL. What is the Oklahoma plan?

Mr. SHERMAN. Sealed bids.

Mr. WILLIAMS. Letting them go and look at the land and paying what those lands are worth. I can not see why when Oklahoma was to be settled it was treated one way and when other reservations are to be opened they are treated another.

Mr. SHERMAN. I will confess or admit that I like the sealed-bid plan myself, and if I were originally drawing the bill, I think I would always provide that the lands be disposed of on sealed bids. This is a Senate bill that is now before us. This bill did not originate in the House.

Mr. WILLIAMS. I understand, but it had a House amendment upon it.

Mr. SHERMAN. Oh, yes.

Mr. WILLIAMS. It might have had another House amendment upon it.

Mr. SHERMAN. The gentleman is correct. It might have had, and yet I believe that no injustice will be done to the Indians; that they may expect to receive a fair return for all of the land disposed of under the plan provided in this bill. There was some question whether the Secretary would be permitted to name a citizen member of the Commission from anywhere in the United States, and so that we might have a citizen member who was most likely to have knowledge of the value of the property, we made the limitation to the House amendment that that member must be a citizen of the States either of North or of South Dakota.

Mr. FINLEY. I would like to ask the gentleman a question. In section 7 of the bill it provides that sections 16 and 36 are to be reserved for school urposes and to be paid for by the Government of the United States at the rate of $2 per acre. I wish to ask the gentleman this. When the State of South Dakota was made a State, was or not the State of South Dakota given school lands or lieu lands for school purposes to correspond with the amount of Indian lands held by Indians in reservations like this?

Mr. SHERMAN. Oh, no. I am very sure that that was not done in either of the Dakotas, because it has not been done anywhere, so far as I know.

Mr. FINLEY. The States have not been granted lieu lands where lands were held by the Indians?

Mr. SHERMAN. There have been times later on when Indian reservations have been opened up that that has been done, but there are no lieu lands that could be used in the Dakotas at the present time.

Mr. FINLEY. When the Territory was created into a State, a provision was made for the homesteaders?

Mr. SHERMAN. A provision was made in the enabling act that the United States grant to the States sections 16 and 36 for school purposes.

Mr. FINLEY. Right here, was any calculation taken of the lands held by Indians—

Mr. SHERMAN. I will ask the gentleman from South Dakota [Mr. Hall] to answer the question.

Mr. HALL. I will say that the enabling act under which South Dakota, North Dakota, Washington, and Montana were admitted—it was an omnibus bill—provided for the granting in presenti of sections 16 and 36 for school purposes, and then it provided that in the case of the Indian reservations that grant of these sections for school purposes should be held in abeyance until the reservation was opened. Does that answer the gentleman's question?

Mr. FINLEY. Yes.

Mr. SHERMAN. I will reserve the balance of my time.

Mr. MANN. Will the gentleman yield for a question?

Mr. SHERMAN. Yes.

Mr. MANN. If this bill becomes a law, I know I should have a great many inquiries about how people can get the land. I have not heard it explained.

Mr. SHERMAN. I have attempted to explain it. Possibly the gentleman was not here. It is to be opened under the proclamation of the President after surveys have been made, and upon terms that he states in the proclamation.

Mr. MANN. That is what I understood; but what terms is he going to state in the proclamation? Does anyone know?

Mr. SHERMAN. I have also stated that, that the land will be appraised—

Mr. MANN. I have heard all that, but what I do not know is by what process, if I want to obtain some of this land, I would proceed.

Mr. SHERMAN. You would proceed in this way: After the proclamation had been made you would then apply through the land office for a particular portion of the land which you desired to acquire title to, and by leaving with them the money, laying down one-fifth of the price of the entry to which you made claim, and paying the other four-fifths in five equal annual payments—

Mr. MANN. I understood from the gentleman, and that is what I wanted to understand, that the land was to be sold on secret bids after an appraised valuation—

Mr. SHERMAN. No; sold for an appraised valuation.

Mr. MANN. Who gets the land if forty people make claim for the same piece?

Mr. SHERMAN. Under the general land law.

Mr. MANN. Is there to be a rush for the land?

Mr. SHERMAN. Will the gentleman from South Dakota answer the gentleman?

Mr. HALL. I will endeavor to explain the matter to the gentleman. The application will be made substantially under the homestead law. A person entering the land which is to be disposed of under the provisions of this act will have to conform to the requirements of existing law concerning homesteads. In addition he will be required to pay this price in five annual installments.

Mr. MANN. That means a rush for the land.

Mr. HALL. No; I will get to that in a moment. In the Rosebud Reservation, a portion of which was opened two or three years ago, the methods adopted by the Department then so as to avoid this confusion and avoid these horse races was that persons might register for land. Then after a certain period and on a certain date a drawing was had of the number of claims that there were for disposal. They were drawn by lots so as to be absolutely fair.

Mr. MANN. This is the Oklahoma plan to which the gentleman from Mississippi referred.

Mr. HALL. This is not sealed bids.

Mr. MANN. But I understand the drawing plan was the Oklahoma plan to which I understood the gentleman from Mississippi referred. Is that to be the plan?

Mr. HALL. I did not so understand him. I understood him to say there were sealed bids for the land. In this case the price is fixed by this Commission and

the lands are selected by lot in the manner in which I have indicated so as to avoid this confusion and rush.

Mr. MANN. In the same method which was used at the Rosebud Agency.

Mr. HALL. Yes. I assume that will be the method adopted by the Department.

The SPEAKER pro tempore. The time of the gentleman has expired.

Mr. WILLIAMS. Mr. Speaker, I yield five minutes to the gentleman from Oklahoma [Mr. Carter].

Mr. CARTER. Mr. Speaker, I do not think I desire to use all of that time. It shall not be my purpose to enter into a discussion of the merits or demerits of this bill, but I do desire to explain my vote upon this measure. I am in favor of this bill as it was passed by the Senate and as it was thereafter reported by the House Committee on Indian Affairs, but I do not favor this amendment cutting down the price of the school lands from $2.50 an acre to $1.25 an acre. I do not favor that for the reason that there was what should be considered to all intents and purposes an agreement with those Indians in which they were promised by the Indian agent $2.50 per acre for sections 16 and 36. That is explained in the report, but I will not take up the time of the House to read it. I will say, however, that the exigencies of the occasion will somewhat influence my vote.

We can not afford, Mr. Speaker, to retard the progress of these two States by a minor matter like this, in my opinion. The States of North and South Dakota have, as I understand, something more than 2,000,000 acres

of land involved in this proposition which can not be settled until some kind of an arrangement is made, as this bill provides, for the opening up of this reservation, and for that reason I expect to vote for this bill in the hope that when it goes into the conference committee the conferees will see their way clear to keep their agreement with the Indians and award them $2.50 an acre for sections 16 and 36. Now, there is one proposition which should always be taken into consideration in the opening of an Indian reservation, and that is this, that prior to the time of the opening of that reservation the lands are not worth near so much money as they are after the farmers begin to come in, settle, and build homes.

That is what makes the land valuable. The farmers can not come in under the present system, which is as it has been in my State, Oklahoma. They can not come in, and they can not improve the land. But when they do come in this land will be improved, and as it is improved it will increase in value all the land on what is now the reservation, including the allotments of the Indians who now own the lands. As the land around each Indian's allotment is improved and put in a higher state of cultivation just in that proportion will the Indian's original allotment increase in value and be made more productive. So that within a few years the Indian's allotment of 160 acres should be worth as much as all of his lands at present, including allotment and lands sold under the provisions of this bill. It would be a good deal for the Indian even though he is deprived of a portion of the value of sections 16 and 36. For that reason, Mr. Speaker,

I expect to give my sanction to the bill by voting for it, purely upon the ground, as I said, of the exigencies of the occasion and for the reason that I think the conference committee will undoubtedly see their way clear to reinstate $2.50 an acre instead of $1.25 an acre and thereby keep the plighted faith of the Federal Government with its helpless wards. [Applause.]

I yield back the remainder of my time to the gentleman from Mississippi [Mr. Williams].

Mr. WILLIAMS. Mr. Speaker, I yield five minutes to the gentleman from Virginia [Mr. Saunders].

Mr. SAUNDERS. Mr. Speaker, I can not agree with my colleague on the committee [Mr. Carter], as to the conclusions reached in respect to this bill. I want to bring to the attention of the House the facts in relation to the case as they were developed before our committee.

Now, this is a case in which the Government of the United States has undertaken to pay for 166,000 acres of land for school purposes. It would seem to be a simple proposition that when the Government undertakes to take this land from these Indians, it would pay them a reasonable price for the land taken.

It was developed before our committee that this land is easily worth from $5, to $10 an acre. At a most moderate estimate it may be put at an average of $5 an acre. Then it was further developed before our committee, by the statement of Major McLaughlin, that in substance an agreement was made with the Indians for this purchase.

Now, I do not mean to say that any formal agreement was made, because there was none, but the

circumstances under which Major McLaughlin undertook to say to these Indians that he would recommend that $2.50 should be paid for this land, and that was the specific amount that these Indians were demanding were sufficient to make a contract. When you consider the relations of these contracting parties, the representatives of a powerful Government on the one hand, the helpless Indians on the other, I think it can fairly be said in the light of what passed that there was almost a specific contract that $2.50 should be paid per acre for these lands. It was said in the course of this discussion, that as the United States Government is increasing the value of these lands, therefore it has a right, in substance, to reduce the price of the land that it takes and pays for, from $2.50, to $1.25 an acre.

The House ought to bear in mind that the opening of these reservations is not something that is sought after by the Indians, but something that is pressed upon these Indians by influences operating from the outside. This particular agency has been opened as the result of this pressure, and, that being so, you can not say that the Indians should pay in this indirect way for the benefit of the opening. If we have given any benefit to these lands, as the result of the other things that have been referred to in this debate, then the way for the Indians to get that benefit is by that simple and direct method which was taken in the State of Oklahoma, and that is to put this land up to the highest bidder.

I have never been able to ascertain, Mr. Speaker, why it is, with respect to these and other cases of this

sort that have come before our committee, that a scheme that operates so well in general, a scheme that has operated so well in the State of Oklahoma, a scheme that is per se right, namely, to allow a man to come forward and on his judgment on the land, to make his bid, is not right under any, and all circumstances, under which land is put up to be sold for the benefit of any party?

Mr. HACKNEY. I would like to ask the gentleman if he does not recognize the fact that Oklahoma had been advertised for years, and that the eyes of the whole United States were centered on that land, and they were all on the lookout in making a rush there when the opening came? That would not apply to the other reservation.

Mr. SAUNDERS. Is the gentleman asking the question from the standpoint of the Indians, or of these other people?

Mr. HACKNEY. I am asking it from the standpoint of the Indians.

Mr. SAUNDERS. The answer naturally will be that the Indians, who are the people most interested in this land, and in what this land shall bring, will be only too glad to take the chances of putting the land up to the highest bidder, and ascertaining thereby whether they will get $1.25 an acre, or more for it.

Mr. HACKNEY. Mr. Speaker—

Mr. SAUNDERS. I can not yield further. I have only five minutes, and no time to yield.

Now, I want to say further, that my colleague on the committee [Mr. Carter] says that he does not approve of taking this land from the Indians that is worth $5, or

$10, an acre and paying them $1.25 for it, but under the exigencies of the occasion, he thinks it would be best to vote for the amended bill. Mr. Speaker, there is another way that we can meet the exigencies of this occasion, and an easy way, and that is to do what is the plain, obvious, direct and fair thing with these Indians, namely, when we take land worth $10 an acre, to pay them the agreed sum of $2.50 this being the pitiful sum that they are asking. [Applause.]

These are the facts of the case. Here is the statement of Mr. Commissioner Leupp and of Major McLaughlin, and, I say, now as I said in the beginning, that no one can read this statement without being impressed with the fact that what passed between Major McLaughlin, and the Indians, almost amounts in the highest form, and indeed in final form, to an absolute contract that they should be paid $2.50 an acre for the land.

Mr. WILLIAMS. I yield the gentleman two minutes more. So far as the Indians were concerned they so understood the situation.

Mr. SAUNDERS. They so understood it, and what was stated to them by Major McLaughlin was calculated to impress those people with the idea that the Government would pay them $2.50 per acre, and why should the United States Government not do it?

The Senate bill agrees to pay them $2.50 an acre for the land taken. What are the facts in the case as to its value?

As to the value of the land, it was agreed to in the deal between the Indians and Major McLaughlin. The

Senate bill has done what is the plain and obvious thing for us to do--namely, to give the Indians $2.50 per acre, as agreed. This after all is far below the value of this land.

I submit, Mr. Speaker, that taking all of these things together, no great hardship is going to follow to anyone if the result of our adverse action on this bill is to delay its passage. No mischief is going to result to anyone, as a result of that delay, and that being so, we ought to meet the exigencies of the situation by voting against this bill, and letting it be brought up again, as it can be, in this House, without this amendment being tacked to it. Then we can do what is just for these Indians.

Mr. WILLIAMS. Mr. Speaker, after the argument of the gentleman from Virginia I do not believe the facts of this case, as I understand them, can be stated any plainer to the House. It seems quite clear to me that the amendment ought not to be on the bill, and on account of it the bill ought to fail. Certainly, the gentleman can bring the matter before the House later on under a motion to suspend the rules, without the amendment, and in that way can give to the Indians for the school lands the $2.50 an acre that they understood they were to get from the United States Government, and that they were justified in expecting upon the statement which had been made to them by its agent. I hope the bill will be voted down. [Cries of "Vote"]

OPENING OF CHEYENNE RIVER AND STANDING ROCK RESERVATIONS.

The SPEAKER pro tempore. The question is on suspending the rules, discharging the Committee of the Whole House on the state of the Union from the further consideration of the bill, agreeing to the amendments, and passing the bill.

The question was taken, and the Speaker pro tempore announced that the ayes seemed to have it.

Mr. WILLIAMS. I ask for the yeas and nays.

Mr. SHERMAN. I raise the question of the absence of a quorum.

The SPEAKER pro tempore. Evidently there is not a quorum present. The Doorkeeper will close the doors; the Sergeant-at-Arms will notify absent Members; as many as favor the motion will, when their names are called, answer "yea;" those opposed will answer "nay;" those present and not voting will answer "present," and the Clerk will call the roll.

The question was taken, and there were—yeas 130, nays 79, answered "present" 17, not voting 152, as follows:

42 Cong. Rec. 7018 (Senate, May 27, 1908)

LANDS IN SOUTH DAKOTA AND NORTH DAKOTA.

The VICE-PRESIDENT laid before the Senate the amendments of the House of Representatives to the bill (S. 1385) to authorize the sale and disposition of a portion of the surplus and unallotted lands in the Cheyenne River and Standing Rock Indian reservations in the States of South Dakota and North Dakota, and making appropriation and provision to carry the same into effect, which were:

On page 3, after line 11, to insert:

Provided further, That the Secretary of the Interior may reserve such lands as he may deem necessary for agency, school, and religious purposes, to remain reserved as long as needed, and as long as agency, school, or religious institutions are maintained thereon for the benefit of said Indians; Provided, however, That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee simple to the duly authorized missionary board, or other proper authority of any religious organization heretofore engaged in mission or school work on said reservations, for such lands thereon (not included in any town site herein provided for) as have been heretofore set apart to such organization for mission or school purposes.

On page 4, line 6, to strike out all after "reservations" down to and including "act," line 8.

On page 4, line 17, after "disposition," to insert "until further action by Congress."

On page 4, to strike out line 18 down to and including "common," line 20.

On page 5, line 13, to strike out "State of" and insert "States of North or."

On page 5, line 18, to strike out all after "meet" down to and including "shall," line 21, and insert "and."

On page 5, line 23, to strike out all after "assistants" down to and including "of" where it occurs the first time, line 25, and insert "at such compensation as."

On page 5, line 25, after "Interior," to insert "may approve."

On page 6, line 15, after "respectively," to insert "and no compensation shall be paid to either the commissioners or employees after the said six months."

On page 7, line 1, to strike out "promptly."

On page 7, line 21, after "may," to insert "in the discretion of the Secretary of the Interior."

On page 8, line 17, after "North Dakota," to strike out "as" and insert "the sums to which."

On page 8, line 18, to strike out "thereto."

On page 8, line 19, to strike out all after "annum" down to and including "alike," line 21.

On page 8, line 25, to strike out all after "Interior" down to and including "Indians," page 9, line 4.

On page 9, line 9, to strike out "two dollars and fifty" and insert "one dollar and twenty-five."

On page 10, line 1, to strike out "four hundred and fifteen" and insert "not more than two hundred and twenty-five."

On page 10, line 9, after "appropriation" to insert ", or any further appropriation hereafter made for the purpose of carrying out the provisions of this act."

On page 10, line 22, after "received" to insert "and."

Mr. CLAPP. I move that the Senate concur in the amendments of the House of Representatives.

The motion was agreed to.

CONGRESSIONAL DEBATE ON 1910 AMENDMENTS TO 1908 CHEYENNE RIVER ACT

45 Cong. Rec. 504 (Senate, January 11, 1910)

SCHOOL LANDS IN SOUTH DAKOTA AND NORTH DAKOTA

The bill (S. 3286) to amend sections 7 and 8 of the act of May 29, 1908 (35 Stat. L., p. 460), entitled "An act to authorize the sale and disposition of a portion of the surplus and unallotted lands in the Cheyenne River and Standing Rock Indian reservations, in the States of South Dakota and North Dakota, and making appropriation and provision to carry the same into effect, was considered as in Committee of the Whole.

Mr. KEAN. The bill seems to carry an appropriation of a good deal of money, nearly $500,000. I think we ought to have some explanation of it.

Mr. GAMBLE. The act which the bill proposes to amend was introduced in the Senate nearly two years ago, and the price of the school land was fixed by the provisions of the bill at $1.25 an acre. The bill was submitted to the Indians of the Cheyenne River and Standing Rock reservations, and, with some modifications, it was agreed to by those tribes. The Indians, however, insisted that the payment for the school lands should be $2.50 an acre. The bill was so amended. It was so reported by the Committee on Indian Affairs of the Senate, and it passed this body at $2.50 an acre.

The bill went to the House, and a hearing was had before the House Committee on Indian Affairs, and a

report was made amending the bill and providing that the price should be $2 per acre. By some mistake or error or inadvertence in some manner in the preparation of the report—I do not know any other explanation—instead of using the draft of the bill as it passed the Senate, they used the bill as it was originally introduced, wherein the price was named at $1.25 per acre, and it passed the House at $1.25 an acre, when the committee intended that it should be $2 an acre. The bill passed the House in that form, at $1.25, late in the session of Congress.

It is not only a violation of a formal understanding, but of an agreement with both these Indian tribes. We ought to act honorably and justly by these Indians and carry out the understanding originally had with them.

The original act embraced reservations in the two States of North and South Dakota amounting to upwards of 3,000,000 acres, and this bill has relation to about 166,000 acres in both States for the benefit of the common schools.

Mr. SUTHERLAND. Is it not a fact that the lands embraced in this bill are worth very much more than $2.50 an acre, and if it were not for the fact that arrangements had been made with the Indians to the effect to pay them $2.50 we could offer them for even more than $2.50?

Mr. GAMBLE. In reply to the Senator from Utah, I will say that I think that is entirely true, although I do not have knowledge as to the value of these lands or officially as to the price at which they were appraised. The act provided that all the lands should be appraised

separately in 160-acre tracts. My understanding is that the appraisement which has been made is from 50 cents to $6 per acre. The lands are worth very much more than $2.50 an acre. Recognizing the fact that the Government was acting practically as the custodian for the Indians, and as their guardian, it was thought by the committee that $2.50 an acre would be a fair compensation as between the Government and the Indians. I may say that the Indians are entirely satisfied with that price.

Mr. NELSON. Will the Senator from South Dakota yield to me for a minute?

Mr. GAMBLE. Certainly.

Mr. NELSON. As I understand it, this is a bill to give to the States of North and South Dakota certain school lands within Indian reservations and to compensate the Indians for them. Were the reservations existing at the time the Dakotas were admitted into the Union?

Mr. GAMBLE. They were.

Mr. NELSON. My recollection is clear that those lands which were then in Indian reservations were given to the States by the act.

Mr. GAMBLE. My understanding clearly is that the enabling act providing for the admission of North and South Dakota in the Federal Union explicitly provided that sections 16 and 36 within all reservations in the States by the very act itself vested in and were conveyed to the States as soon as the Indian title was extinguished. This has been the uniform rule followed in the opening of all the reservations in both the States of North and South Dakota.

Mr. KEAN. I think the point raised by the Senator from Minnesota is a very important one. I think the bill had better go over.

Mr. GAMBLE. I am very clear, because I have examined the enabling act, and that is the specific provision.

Mr. NELSON. I should like to have the bill go over until I can examine it.

Mr. GAMBLE. That is entirely satisfactory.

The PRESIDENT pro tempore. Objection being made, the bill will be passed over without prejudice.

45 Cong. Rec. 738-40 (Senate, January 18, 1910)

SURPLUS AND UNALLOTTED LANDS IN NORTH AND SOUTH DAKOTA

The next bill on the calendar was the bill (S. 3286) to amend sections 7 and 8 of the act of May 29, 1908 (35 Stat. L., p. 460), entitled "An act to authorize the sale and disposition of a portion of the surplus and unallotted lands in the Cheyenne River and Standing Rock Indian reservations, in the States of South Dakota and North Dakota, and making appropriation and provision to carry the same into effect."

The Secretary proceeded to read the bill.

Mr. GAMBLE. Mr. President, the bill has already been read and was partially considered the last time the calendar was pending, when the senior Senator from Minnesota [Mr. Nelson] asked to have the bill passed over until he could examine the statute. As I understand, he is now entirely satisfied with it. The bill having already been once read, perhaps it will not be necessary to read it again.

The VICE-PRESIDENT. The bill is before the Senate as in Committee of the Whole and subject to amendment.

Mr. LODGE. Mr. President, undoubtedly there will be discussion about this bill. The last time it came up there was some information promised us as to the law. The Senator from Minnesota raised a question in regard to it.

Mr. NELSON. Mr. President, I have examined the law. When the bill was previously pending I had supposed that lands within Indian reservations were not within the school-land grants of the State of Minnesota, but I found on examining the law that, while the limitation applied to other permanent reservations, it did not apply to Indian reservations. The State, whenever those Indian reservations are opened, is entitled to sections 16 and 36 for schools in each township. This bill proposes to relinquish those lands, and to give the State other lands in lieu of them. The right of the Indian is adjusted and was partially considered the last time the calendar was paid for at the rate of $2.50 an acre [sic]. We are simply buying that land and paying the Indians for it in order that the State can get its school-land grant; in other words, in order that the State may get sections 16 and 36 within the limits of the Indian reservation, we propose to pay the Indians for the land at the rate of $2.50 an acre.

Mr. LODGE. Who gets the money?

Mr. NELSON. It is supposed to go to the Indians. It belongs to the Indians.

Mr. LODGE. Who pays the money—the United States?

Mr. NELSON. I suppose the Government of the United States.

Mr. LODGE. That is, we pay the Indians for the land and then give the land to the State?

Mr. NELSON. Yes.

Mr. LODGE. How much does the bill involve?

Mr. NELSON. I am unable to say. This bill was reported from the Committee on Indian Affairs, and not from the Committee on Public Lands.

Mr. GAMBLE. The bill involves 166,000 acres of land. The enabling act, to which the senior Senator from Minnesota [Mr. Nelson] called the attention of the Senate when this bill was last under consideration, expressly conveys to the State sections 16 and 36 for the benefit of the common schools, and if any of the lands are within Indian reservations, as soon as the Indian title is extinguished, then the title vests in and the lands become the property of the State. It has been the practice of Congress for many years to carry out the provisions of the enabling act and to pay the Indians for such lands, so that they might be conveyed to the State and used for the benefit of the common schools.

Mr. GALLINGER. Mr. President—

Mr. GAMBLE. I will read the section of the enabling act, if the Senator cares to have me do so.

Mr. LODGE. No land was given to the State of South Dakota at the time of the enabling act.

Mr. GAMBLE. There were lands given, and those lands were donated to the State at the same time.

Mr. LODGE. These very lands were given under the enabling act?

Mr. GAMBLE. These very lands—sections 16 and 36—the same as in all the public-land States, were donated to the States, and the grant would become operative as a grant as soon as the Indian title was extinguished.

Mr. LODGE. Do I understanad that the Government of the United States is under obligation to pay four or five hundred thousand dollars to Indians, and then give the lands to the State of South Dakota?

Mr. GAMBLE. The Government certainly is so obligated under the enabling act, and that was the direct proposition.

Mr. LODGE. The provision of the enabling act was for the extinguishment of the Indian title?

Mr. GAMBLE. Yes, sir.

Mr. GALLINGER. Mr. President—

Mr. LODGE. I should like to have that section of the act read.

The VICE-PRESIDENT. Does the Senator from South Dakota yield to the Senator from New Hampshire?

Mr. GAMBLE. Certainly.

Mr. GALLINGER. Mr. President, this is a proposition which involves an expenditure of $415,000. I have heard a great deal about the necessity for economy in governmental appropriations this year, and we have tried to guard the Treasury as well as we could. Now, it seems to me that this matter ought to have more consideration than it possibly can get under Rule VIII, involving so large an amount as it does.

Another observation. A few days ago, when we undertook to get a resolution through here, we were met with the suggestion that it ought not to receive favorable consideration because there was an attorney in the case. I should like to ascertain, if I can, whether or not there is an attorney in this case. I recall the fact that since

I have been a member of the Senate we passed a bill relating to the Indians in which there was an attorney fee of something like $750,000, which was paid to certian lawyers who looked after the matter before Congress. Perhaps the Senator from South Dakota can tell me whether there are any attorneys in this case who are going to divide up this money with the Indians, provided we appropriate it.

Mr. GAMBLE. I can most confidently assure the Senator from New Hampshire that there are no attorneys or attorneys fees, directly or indirectly, connected with this matter. As I stated when this bill was under consideration a few days since, I originally, some two years ago, introduced a bill for the opening of these lands to settlement. The price of the school lands in that bill was fixed at $1.25 an acre. It involved about 3,000,000 acres in the northern part of my State. It has been the custom of the dpeartment to refer these matters to the Indian tribes to see if the propositions contained in the bills would be satisfactory. That was done in this case.

The bill provides for an appraisement of the lands by a commission. These lands, I understand, have been appraised at prices from 50 cents to $6 per acre. The bill was submitted to the Committee on Indian Affairs and had the approval of the department. It passed the Senate, fixing the price to be paid for the land at $2.50 an acre. It went to the House, and by some mistake or misapprehension—and I think the mistake grew out of using the original bill which I introduced providing for payment at the rate of $1.25 an acre—it was reported from the

Committee on Indian Affairs in the House with an appropriation at the rate of $2 an acre; but by a misapprehension it passed the House at $1.25, and afterwards was agreed to in conference.

The department felt that as this matter had been referred to the Indians of the Cheyenne River and Standing Rock reservations and a pledge as nearly as could be was honorably made to them, that a fair price should be paid, which was fixed at $2.50 an acre. They so understood it, and Congress ought to meet that requirement.

This bill was prepared by the department, and not by any attorney. It is an honorable effort to carry out what was the original fair understanding had with these Indian tribes. It is to correct an error, to make right a wrong, and to do justice to these Indian tribes.

I will not take the time of the Senate to discuss the proposition in regard to the provisions of the enabling act. The pending bill adheres to the practice that has been followed in the opening of the reservations not only in South Dakota, but in North Dakota; and this has been the interpretation placed upon it by Congress and by the department.

Mr. GALLINGER obtained the floor.

Mr. STONE. If the Senator from South Dakota will permit me to interrupt him, I should like to ask from what committee this bill comes?

Mr. GAMBLE. This bill came from the Committee on Indian Affairs.

Mr. STONE. Mr. President, before the Senator finally concludes this little running debate, I should like

to have read the statute to which he has referred. It is a very remarkable one.

Mr. GAMBLE. I will read it.

The VICE-PRESIDENT. The Senator from New Hampshire [Mr. Gallinger] has been recognized, and is entitled to the floor. Does the Senator yield?

Mr. GALLINGER. I will make a single observation, and then yield the floor. I notice in the report a letter from the late Secretary of the Interior, who seems to approve of this grant, and yet there is one observation here that is worthy of consideration. The Secretary says:

> I have been unable to determine just when or by whom the amendment to this original bill was proposed suggesting the substitution of $1.25 per acre for $2.50, as originally provided, and the appropriation of $225,000 instead of $415,000 to pay for the lands so granted.

It seems to me, from that suggestion of the late Secretary of the Interior, that there is some doubt as to how the price for these lands was fixed, and I think it ought to be looked into.

Mr. President, I know very little about this matter; but a very large amount is involved in the bill; and after the Senator from South Dakota puts in the RECORD the statute, I propose to object to the further consideration of the bill under Rule VIII, and ask that it go over under Rule IX.

Mr. SUTHERLAND. Mr. President—

The VICE-PRESIDENT. The Senator from New Hampshire objects to the further consideration of the bill, except that he limits his objection so as to permit the Senator from South Dakota to read the statute.

Mr. SUTHERLAND. I want to ask the Senator from New Hampshire a question, if he will permit me.

The VICE-PRESIDENT. Does the Senator from New Hampshire yield to the Senator from Utah?

Mr. GALLINGER. Certainly.

Mr. SUTHERLAND. I understood the Senator from New Hampshire to say that the Secretary of the Interior had suggested a query in his communication as to why the price of these lands had been doubled. My understanding is that the query was exactly the other way, and was as to why the amount to be appropriated had been decreased.

Mr. GALLINGER. The Senator is right on that point. I misinterpreted the suggestion of the Secretary. The Secretary of the Interior raised a question as to why the amount had been decreased rather than increased, but, nevertheless, the larger amount is in the bill we are considering.

Mr. GAMBLE. Mr. President, I call attention to section 10 of the enabling act providing for the admission into the Union of North Dakota, South Dakota, Montana, and Washington, approved February 22, 1889, which reads:

SEC. 10. That upon the admission of each of said States into the Union sections Nos. 16 and 36 in every township of said proposed States, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the

approval of the Secretary of the Interior: Provided, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain.

By the very act itself, Mr. President, the lands become a part of the public domain, and the original grant to the States at that time becomes operative.

Mr. LODGE. Mr. President, I do not wish to delay the bill going over. I merely wish to say, as I asked for the reading of the section of the statute, that it does not in the slightest degree bind the United States to buy the lands and extinguish the title of the Indians on these Indian reservations.

Mr. GAMBLE. Mr. President, on a proper interpretation of the section it certainly does bind the Government.

Mr. LODGE. I am only interpreting the act as I heard it read.

Mr. GAMBLE. It donates affirmatively sections 16 and 36, and then pledges the faith of the Government that when the Indian title becomes extinguished the grant will become operative. It has been the uniform practice of the Government throughout its history in the public-land States to grant these lands, but in later years, as the land has appreciated in value, of course the price and the amount we pay has been increased.

Mr. FRYE. I understand a Senator is entitled to speak once, and then for only five minutes, when considering the calendar under Rule VIII.

Mr. GAMBLE. Perhaps I am occupying too much time, and I apologize to the Senate.

Mr. DAVIS. I should like to ask the Senator from South Dakota a question.

The PRESIDING OFFICER (Mr. Kean in the chair). Does the Senator from South Dakota yield to the Senator from Arkansas?

Mr. GAMBLE. Certainly.

Mr. DAVIS. I am a member of the Committee on Indian Affairs, Mr. President. This bill was referred to that committee. It was introduced by the Senator from South Dakota [Mr. Gamble], and by that committee was referred to the Senator himself as a subcommittee. The Senator brought the bill before the committee, and insisted upon it being reported out the same morning.

Mr. GAMBLE. Mr. President, I desire to correct the Senator from Arkansas. This bill was a department bill, which had been introduced by the junior Senator from Minnesota [Mr. Clapp], the chairman of the Committee on Indian Affairs, during the last Congress. It was reported from the Committee on Indian Affairs by the junior Senator from Utah [Mr. Sutherland] in the Senate a year ago.

Mr. DAVIS. If the Senator will permit me—

Mr. GAMBLE. The Senator will permit me an additional word. Then, during the present session, this bill having been favorably reported heretofore, it was

reported at the first meeting of the Committee on Indian Affairs. The bills to which the Senator from Arkansas refers, or the ones he now has in mind, are two other bills on which reports were directed to be made at the last sitting of the Committee on Indian Affairs of the Senate.

Mr. DAVIS. Be that as it may, Mr. President, the Senator from South Dakota insisted in the committee upon an immediate report of this bill. I objected to the terms of the bill at the meeting of the committee, and it was expressly understood between the Senator from South Dakota and myself that he would satisfy me about this bill before he reported it to the Senate. I have had no conference with the Senator from South Dakota about it. I should like to have read that provision of the bill which relates to the disposition of the school lands.

Mr. GAMBLE. Of course I do not want to detain the Senate unduly in the consideratin of this bill, but with the utmost courtesy, I want to say in reply to the Senator from Arkansas that he is entirely mistaken. As I clearly recall, this bill was authorized to be reported when the Senator from Arkansas was not present. I may be in error as to that, but it was a unanimous report.

Mr. DAVIS. This bill was reported from the Committee on Indian Affairs at its last meeting on last Thursday, when it was distinctly understood that the Senator from South Dakota should satisfy me about the bill before it was reported to the Senate.

Mr. GAMBLE. I desire to correct the Senator —

The PRESIDING OFFICER. The debate is proceeding by unanimous consent.

Mr. GAMBLE. I will ask unanimous consent to make the statement that the Senator from Arkansas—and I say it with the utmost respect—is entirely mistaken. He is referring to a matter that occurred in the committee at its last session. This bill was reported on January 6, 1910. The conversation to which he refers applies entirely to other bills, and not to this bill.

Mr. SUTHERLAND. Mr. President, if I may be indulged a moment, the Senator from Arkansas [Mr. Davis] is mistaken in his statement. As I recall the facts, he evidently has reference to some other bill. I do not know just how far we ought to discuss the proceedings in committee here, but the fact is that when this bill was authorized to be reported, I remember very distinctly that the Senator from Arkansas was not present. The matter was called up before the Committee and the Senator from South Dakota was authorized to report on the bill without discussion, because identically the same bill had been authorized to be reported by the committee at the preceding Congress, had been reported, and, as I recall, had been passed by the Senate. It then went to the House of Representatives, and the House amended the bill by fixing the smaller amount. It is only because of those circumstances that the bill is brought back again.

Mr. DAVIS. Mr. President, on referring to the calender, I find that I am mistaken.

The PRESIDING OFFICER. The Senator from New Hampshire [Mr. Gallinger] has objected to the further

consideration of the bill, and it goes to the calender under Rule IX.

Mr. GALLINGER. Before the bill goes over I desire to have read a proposed amendment, which I shall offer to the bill when it is again up for consideration.

The PRESIDING OFFICER. Without objection, the Secretary will read the proposed amendment.

The SECRETARY. Add at the end of the bill:

Provided, that no part of the appropriation herein made shall be allowed for fees or compensation of any kind to attorneys or agents.

Mr. GAMBLE. I will accept the amendment, and I trust that, as the bill is a matter of importance, the Senator from New Hampshire will withdraw his objection.

Mr. GALLINGER. I must insist that the bill go over.

The PRESIDING OFFICER. The Senator from New Hampshire adheres to his objection, and the bill goes over.

Mr. GAMBLE. I have no objection whatever to the proposed amendment.

45 Cong. Rec. 1043-1049 (House, January 26, 1910

SALE AND DISPOSITION OF INDIAN LANDS IN NORTH DAKOTA AND SOUTH DAKOTA

The Committee on Indian Affairs was called.

Mr. BURKE of South Dakota. Mr. Speaker, by direction of the Committee on Indian Affairs, I call up the bill (H.R. 12438) to amend sections 7 and 8 of the act of May 20, 1908, entitled "An act to authorize the sale and disposition of a portion of the surplus and unallotted lands in the Cheyenne River and Standing Rock Indian Reservations, in the states of South Dakota and North Dakota, and making appropriation and provision to carry the same into effect."

The SPEAKER. Under the rule, the committee will resolve itself into Committee of the Whole House on the state of the Union.

Accordingly the House resolved itself into the Committee of the Whole House on the state of the Union, with Mr. PERKINS in the chair.

The CHAIRMAN. The House is now in Committee of the Whole House on the state of the Union for the consideration of the bill which the Clerk will report.

Mr. BURKE of South Dakota. Mr. Chairman, I ask unanimous consent that the first reading of the bill be dispensed with.

The CHAIRMAN. The gentleman from South Dakota asks unanimous consent that the first reading of the bill be dispensed with. Is there objection?

There was no objection.

Mr. BURKE of South Dakota. Mr. Chairman, the purpose of this bill is to pay to the Indians belonging to the Cheyenne and Standing Rock tribes in my state and in North Dakota $1.25 an acre for about 150,000 acres of land, being land that was ceded to the State as school lands under a bill that passed in the first session of the Sixtieth Congress. That bill provided that sections 16 and 36 should be ceded to the State for school purposes, and as it became a law it provided that the Government should pay only $1.25 an acre therefor.

The purpose, as already stated in this bill, is to pay $1.25 an acre additional to the $1.25 that has already been paid. I may say, going back to 1907, that a bill was introduced in this House authorizing the sale of a certain portion of the Cheyenne and Standing Rock Indian reservations in my State, providing that sections 16 and 36 should be ceded to the State for school purposes, and providing that there should be paid for the school sections $1.25 an acre.

The Commissioner of Indian Affairs, by letter transmitted through the Secretary of the Interior, requested that there be no action upon that bill until there had been some negotiations with the Indians occupying these reservations. Major McLaughlin, an inspector in the Indian service, a man who has had thirty-eight years experience in dealing with the Indians, was sent to the reservation with the bill which I have referred to.

He took up the different provisions of this bill, held a number of councils with the Indians, agreed with

them as to the provisions in the bill, except that they demanded $2.50 an acre for sections 16 and 36, instead of $1.25, as proposed in the bill.

Mr. McLaughlin promised the Indians that he would recommend that the price of these lands be fixed at $2.50 an acre. He made his report, and upon the filing of that report in the Interior Department the Secretary of the Interior transmitted to Congress a communication in which he called attention to the report of Major McLaughlin, sent a copy of it to the Committee on Indian Affairs in the Senate, and called particular attention to the fact that there was an understanding that the price of the school section was to be $2.50 an acre, instead of $1.25 an acre.

The Senate committee, in considering the bill in the Senate, which had been introduced with the $1.25 price, the same as in the House, amended the bill, fixing the price at $2.50 an acre, and the bill passed the Senate in that form. It came over to the House and was referred to the Committee on Indian Affairs by the committee having jurisdiction thereof.

Now, Mr. Chairman, there is some question about what happened after this bill was referred to the Committee on Indian Affairs and after it was reported and when it passed the House. I did not happen at that time to be a member of either the Committee on Indian Affairs or of the House, so I am obliged to speak by what I find in the RECORD and what I can learn from Members who were upon the committee at that time.

I find and I hold in my hand a copy of the report made upon the bill H.R. 1385, first session of the Sixtieth Congress, and I find by that report that the bill fixed the price of school lands at $2.50 an acre and was amended by striking out 50 cents and leaving the price $2 instead of $2.50 an acre.

I call attention further to the report where it states an appropriation is made to pay the Indians for these lands, namely, the school sections at $2 per acre. The report says:

> Sections 16 and 36 are reserved as school lands for the States of North Dakota and South Dakota, which is in accordance with the Enabling Acts of these States. An appropriation is made to pay the Indians for these lands at the rate of $2.00 per acre.

That, Mr. Chairman, is the report of the Committee on Indian Affairs.

I now find in the RECORD that on May 26, 1908, Mr. Sherman, the then chairman of the committee, moved to suspend the rules and pass the bill, and as the bill is printed in the RECORD it appears that the price of these lands was $1.25 an acre instead of $2 an acre as it should have been, according to the report made by the committee. When the price from $2 to $1.25 an acre was changed I do not know, and I have been unable to obtain any information that it ever was changed, except that in calling up the bill they must have gotten hold of the bill as originally introduced, which provided a price, as I have already stated, of $1.25 an acre.

Mr. MANN. Will the gentleman yield?

Mr. BURKE of South Dakota. Certainly.

Mr. MANN. Why, the bill that was called up was a Senate bill, and the Senate bill that is called up is the engrossed bill coming from the Senate. There is no such possibility as the gentleman suggests.

Mr. BURKE of South Dakota. I can only say that the RECORD shows that the price was $1.25 an acre, as the bill was printed. I have in my hand a report of the Committee on Indian Affairs—

Mr. MANN. So have I.

Mr. BURKE of South Dakota. Which fixed the price at $2 per acre.

Mr. MANN. I will give the gentleman the information as to how it got changed. He has not been able to discover it.

Mr. BURKE of South Dakota. I thought I stated very fairly that I did not know how it had occurred. I have no doubt that I did not know how it had occurred. I have no doubt that my genial friend from Illinois, when he gets an opportunity in his own time, will be able to tell the House exactly where and how that change took place. I am unable to do so; but I find, Mr. Chairman, that when this bill was considered in the House members of the Committee on Indian Affairs protested against its passage because it proposed to pay only $1.25 to the Indians instead of $2.50 an acre.

The bill was considered under a suspension of the ;rules, and it wuld have been impossible to amend it, and it was either a question of defeating it or passing it in the form in which it was presented and trusting to the conferees to make the change to the price of $2.50. I

find that the gentleman from Oklahoma [Mr. CARTER] in his remarks said that he would support the bill only because he had confidence in the conferees that they would do justice to these Indians and change the price to $2.50 an acre, as passed by the Senate and in accordance with the agreement that had been made with these Indians. I find that the gentleman from Virginia [Mr. SAUNDERS], a member of the committee, refused to support the bill because of the fact that it did not carry out the agreement made with the Indians, and he and others of his collegues, especially on that side of the House, voted against the passage of the bill because, as he stated, it was doing an injustice to these Indians.

Mr. STEPHENS of Texas. Will the gentleman yield?

Mr. BURKE of South Dakota. Yes.

Mr. STEPHENS of Texas. I desire to ask how long before this bill passed was it that this agreement had been made.

Mr. BURKE of South Dakota. Just a few months, I could not say just how long it was.

Mr. STEPHENS of Texas. This is the same bill that we have the statement of Major McLaughlin upon, to the effect that the Indians agreed to take $2.50?

Mr. BURKE of South Dakota. Yes.

Mr. STEPHENS of Texas. And that they stood by that still?

Mr. BURKE of South Dakota. Yes.

Mr. STEPHENS of Texas. And demanded that the Government should be fair with th and carry out that agreement.

Mr. BURKE of South Dakota. They insisted that they be paid $2.50 an acre, and Major McLaughlin promised, just as much as he could promise, that they would receive $2.50 an acre if the bill was enacted into law.

Mr. STEPHENS of Texas. Was he an agent of the Government sent there for the purpose of making this treaty with them?

Mr. BURKE of South Dakota. That was the purpose, and it was in accordance with article 12 of the agreement made with the Indians in 1889 that further disposition of their reservations should be made after negotiations with some representative of the Interior Department, and the Secretary of the Interior was authorized to appoint a person to so negotiate.

Mr. STEPHENS of Texas. Then, is it not a fact that we are bound as far as we can be bound by that treaty with the Indians to pay them $2.50 an acre?

Mr. BURKE of South Dakota. My judgment is that we are, or I would not be advocating the passage of this bill.

I want to call attention, Mr. Chairman and Members of this House, to one paragraph in the report made by the commission which negotiated the treaty of 1889 with the Sioux Indians in South and North Dakota. After commenting on the manner in which the Government had treated with Indians theretofore, and perhaps suggesting that the Government had not always ketp faith with them, the commission made this suggestion:

The Indians of this generation should be made to feel that the performance of the Nation is equal to its promises.

Now, Mr. Chairman all I am here for at this time is to demand that the Government keep its promise with these Indians and pay to them the price for the land that we agreed to pay through our representative who was sent there to negotiate with them under authority of law. Mr. Chairman, I want to call attention for a moment to another thing that perhaps will be new to the Members of this House. The agreement made with the Sioux Indians in 1889 provided that the proceeds from the sale of the surplus and unused lands when sold should be paid into the Treasury of the United States to the credit of the Indians and thereafter be subject to appropriations by Congress for their civilization, education, and support, so that the moneys that these Indians receive from the sales of the lands authorized to be sold under the act we now propose to amend will not receive any benefit except that they will be supported thereafter from the funds that go into the Treasury from the sale of the lands, instead of being supported under the provisions of the treaty of 1877, which obligates the Government for all time to provide for them until they are self-supporting.

And, I will say in the Indian appropriation bill, which is now upon the calender of this House, that the committee reduced the appropriation for the support of the Sioux Indians, and particularly the Indians affected by the pending bill, to the extent of $150,000 and provides that that amount should be appropriated from the money

belonging to these Indians in the Treasury instead of taking it out of the public funds belonging to the United States. So that if we pass this bill we will put into the Treasury to the credit of the Indians somewhere near $200,000, and next year we will take it out for their care, their support and their education, and if we do not put this money into the Treasury to their credit we will take money out of the public funds for their care and support. Therefore we practically accomplish nothing so far as the Indian is concerned, except that we keep the solemn promise and obligation made by the Government when the Indians consented that the surplus and unallotted lands described in the act which was passed, to which I referred in the opening part of my remarks, might be sold and disposed of. Now, it seems to me, Mr. Chairman, that no man can object to the passage of this bill, and let us from this time forth declare and let the Indians understand that when we make an agreement with them we are going to keep it by carrying out to the letter what we promised to do. I reserve the balance of my time.

Mr. SABATH. Will the gentleman yield for a question?

Mr. BURKE of South Dakota. Certainly.

Mr. SABATH. Have these lands been disposed of?

Mr. BURKE of South Dakota. The lands have not been disposed of. Under the terms of the law the Indian first had to be allotted.

Mr. SABATH. Yes.

Mr. BURKE of South Dakota. After the allotments were completed then the lands had to be examined by

the Geological Survey, to ascertain whether or not there was any mineral land to be affected. Then a commission was to be appointed, consisting of one resident from South Dakota, one Indian having tribal relations with the tribe, and one representative from the Interior Department, to appriase the lands and fix the price at which they should be disposed of to the settlers under the provisions of the homestead law. That commission has completed its work and its report is on file, and the present intention is that on the 1st of April, if the time is not extended until the 1st of May, these lands will be open to settlement to homestead settlers.

Mr. SABATH. So these lands have not as yet been opened for homestead settlement?

Mr. BURKE of South Dakota. They are not as yet subject to homestead entry.

Mr. SABATH. But I understood the gentleman to state the report of the commission is now ready to publish.

Mr. BURKE of South Dakota. It is not published, Mr. Chairman, although I know what it contains, so far as the value of the lands is concerned, if that is what the gentleman refers to. The price of the land, I understand, is from $6 an acre down to 50 cents.

Mr. SABATH. I was not interested in the price; I was interested in the disposal of the lands—how they were to be disposed of.

Mr. BURKE of South Dakota. Under the homestead law, by what is known as the registering—

Mr. SABATH. Under the same old process.

Mr. BURKE of South Dakota. The same process that is commonly referred to as a lottery, but is not, in fact, a lottery.

Mr. SABATH. That is the information I desired. I expect, when the time presents itself, to try to amend the law under which these lands have been disposed of.

Mr. BURKE of South Dakota. I reserve the balance of my time.

Mr. MANN. Mr. Chairman, it is not my intention to take very much of the time of the House, but this is one of those very peculiar cases which I think ought to be brought to the attention of the House. My friend from Minnesota suggests that the Government ought to keep an agreement with the Indians. Very well, but the Indians ought to keep an agreement with us. Now, what are the facts in this case? On December 9, 1907, one of the Senators from South Dakota introduced the bill (S. 1385) in the Sixtieth Congress for the purpose of allotting lands in this Indian reservation, and so forht, and, among other things, for the purpose of setting aside sections 16 and 36 in each township, to be paid for by the United States at $1.25 per acre.

That was the original motion of the gentleman representing the great State of South Dakota, who introduced the bill which finally became a law. For years it has been the policy of our Government to give certain sections of the public lands to the States for school purposes, and although originally the public land, or much of it, was sold under the various laws and the ownership of it was considered as an asset of the Government, under

the recent practice of the United States the ownership of the public lands is not only not an asset, but a distinct liability, because we not only give away the land which we do not give to the States, but in the case of the Indian lands, we buy from the Indians in order to give it to the States.

This bill was amended when it was reported into the Senate, so as to make its price $2.50 an acre, and all of the facts in reference to an Indian agent or an agent of the Indian Office who visited these Indians were known and laid before Congress. It passed the Senate with the provision for $2.50 per acre that the Government should pay to the Indians for these lands to present to the States of North and South Dakota. It came to the House at $2.50 an acre.

The Committee on Indian Affairs considered the matter and reported the bill back to the House, providing the striking out of the $2.50 an acre and inserting $2 an acre. The matter pended before the House some time on the Union Calendar. The gentleman from South Dakota [Mr. BURKE], and some other distinguished gentleman who has spoken elsewhere, has stated that they could not find out, or did not know, how the bill finally passed at $1.25 an acre; that it was stated in another distinguished body, not far distant, that it was by an accident that nobody could discover. If Congress gets to the point that it accidentaly strikes out $2.50 an acre for the land it has to pay for and accidentally puts in $1.25 an acre, it is time we discovered those accidents.

What, though, are the facts? The distinguished gentleman who now presides over the Senate of the United States was the chairman of that distinguished committee, the Committee on Indian Affairs. This matter was discussed among the Members of the House, as to whether it should be the policy of the Government in opening Indian reservations and giving two sections in a township to the States, to pay more for this land than had been the custom in the past. As I recall, there never has been a case where the Government has paid more than the $1.25 an acre. If so, this land is worth more. Very well. Who made it worth more? Was it the Indians who have raised the value of this land from $1.25 an acre to $6 an acre, as the gentleman from South Dakota [Mr. BURKE] says it is now worth? Is it not doing pretty well by the Indians if we make the settlers pay to them the increase in the value of the land which the white settlers have made, and not a cent's worth due to thework of the Indians themselves?

Mr. BURKE. of South Dakota. Will the gentleman yield for a question?

Mr. MANN. I always yield.

Mr. BURKE of South Dakota. Did I understand the gentleman to say that prior to the time when the bill referred to passed that $1.25 an acre was the ;highest price that had been paid to the Indians for these lands that were ceded to the States?

Mr. MANN. Well, I do not know whether the gentleman so understood me or not.

Mr. BURKE of South Dakota. Well, I wanted to see, if I did so understand, why he makes the statement.

Mr. MANN. I am perfectly willing for the gentleman to make a speech.

Mr. BURKE of South Dakota. I wish to say this, because I know the gentleman wants to be fair and does not want to mislead the House.

Mr. MANN. Cut that out, as everybody knows that.

Mr. BURKE of South Dakota. I want to say in two propositions similar to this in my State prior to the time this bill was considered, Congress paid $2.50 an acre to the Indians for sections 16 and 36.

Mr. MANN. Well, very likely. It has been the practice of the Government to pay $1.25, and I can readily see why the evil effects of the precedent that has crept in sometimes of paying more than that, should thereby encourage gentlemen in making more of an effort to open the Treasury. Now, the gentlemen had all these facts before them when this bill was up. A distinguished gentleman, now the Vice-President, who has as much knowledge of Indian affairs as any man in this country, and a very careful protector of the Indians' interests in these lands, proposed in this House to make this rate $1.25 an acre. There was no mistake about it, there was no question about it. Some gentlemen then on the committee opposed the proposition on the floor of the House, for the reason that this amount was cut down; but the House, with a full understanding of the subject, determined itself to make the rate $1.25 an acre.

The Senate accepted that. In every essential particular that was a contract between the House and the Indians and the people who are interested in having this reservation opened, that this provision should remain in the bill; and yet the moment when they have secured the enactment of legislation permitting them to open this reservation, on terms such as they seek, they want to come in here and open up a part of the bill which is greatly to their interests without offering to open those poarts which are contrary, in my opinion, to the interest of the public. [Applause]

Mr. BURKE of South Dakota. I desire to ask one further question.

Mr. MANN. I always yield to the gentleman.

Mr. BURKE of South Dakota. The report upon this bill, as I have stated, and as the gentleman from Illinois states, shows that the price fixed by the committee was $2 an acre.

Mr. MANN. Wait a moment; but the committee does not fix the price. The price, as recommended by the committee, was at $2 an acre.

Mr. BURKE of South Dakota. Very well. Can the gentleman tell us when the proposition was changed or fixed at $1.25, and by whose authority it was done?

Mr. MANN. Why, certainly, I will tell the gentleman. I have already told the House. When the gentleman gives me attention, I will tell him again.

Mr. BURKE of South Dakota. I will ask the gentleman if the bill was not passed under a suspension of the rules, and Members on the floor made the statement

that they voted for it believing that the conferees would do justice to the Indians and agree to the price as fixed by the Senate?

Mr. MANN. Oh, well, I do not know what every Member on the floor might have said, or what he believed. If he believed such a conversation would change the action of the House, why, he ought to be seeking a home at an asylum.

Now, the bill was presented to the House. It was before the House, and the gentleman from New York [Mr. Sherman] moved to suspend the rules and pass the bill with an amendment which he offered. The bill was read with this amendment. When this amendment was presented the House was not graced with the presence of the gentleman from South Dakota, much to my personal regret; but I remember the presentation of the bill as distinctly as if it were yesterday.

Mr. BURKE of South Dakota. I observe from the RECORD that the gentleman was in the House, as he usually is when there is any business being transacted; but the gentleman has not yet said how this amendment got in this bill.

Mr. MANN. I have said it seven or eight times, and am ready to say it again, if the gentleman will permit me.

The gentleman from New York [Mr. Sherman], chairman of the Committee on Indian Affairs, moved to suspend the rules and pass the bill with the amendments which he sent up, and one of those amendments was the

amendment changing the rate from $2.50 an acre to $1.25 an acre. Does not that answer the gentleman's question?

Mr. BURKE of South Dakota. No; it does not. The chairman of the committee was supposed to report the bill to the House as directed by his committee.

Mr. MANN. Why, the gentleman from South Dakota certainly has been on this floor long enough to know that even in moving to suspend the rules or call up a bill the chairman in charge of the bill offers an amendment which the committee has not recommended. I have just offered four in that shape, and had them adopted by the House this afternoon on bills which passed.

It is not an uncommon thing. Gentlemen frequently do it. The truth is, that bill never could have passed the House except for the change that was made, and the gentleman from New York [Mr. Sherman], then chairman of the Committee on Indian Affairs, himself believed that the change ought to be made, and so stated.

Mr. BURKE of South Dakota. If he so stated, he did not state it in the presence of this House, or at least it does not appear in the RECORD, which I have before me. At least, I have not found it.

Mr. MANN. I will not undertake to remember what the gentleman stated on the floor of the House, but I know he made that statement, and he will make that statement now, I think, if the gentleman will go to him.

Mr. BURKE of South Dakota. I can not yet see what right he would have to submit any amendment, except as reported by the committee.

Mr. MANN. It is very peculiar that the gentleman can not get that particular parliamentary propositon into his mind. It certainly is not only a common practice, but it is a legitimate practice. It is the proper thing to do. The gentleman from New York [Mr. Sherman] never betrayed any power which he had in the House. He never betrayed the committee which he reprsented on the floor of the House. The gentleman from South Dakota [Mr. Burke] would indicate that the gentleman from New York [Mr. Sherman], the present Vice-President of the United States, offered a motion on the floor of the House which he had no moral right to make. That is preposterous. He offered the amendment. It was agreed to by the House. It became the law; but the moment they had opened this Indian reservation under this provision of the law, these gentlemen come in and say we ought to raise the price. Both they and the Senate were mighty willing to take the law with the change which was made by the House. They were much more anxious to obtain the law and the other provisions in it than they were to stand on this particular provision. But having secured the benefits resulting from the balance of the act, they are now trying to renege on this particular proposition. I am against it. I think when a fair proposition is made everybody ought to stand by it.

Mr. CRUMPACKER. Does the gentleman remember whether the Senate agreed to the House amendment or whether the bill went to conference?

Mr. MANN. The Senate agreed to the House amendment, as I remember.

Mr. STEPHENS of Texas. Is it not a fact that the reason why these Indians should have $2.50 an acre instead of $1.25 an acre is on account of the agreement made with the United States Government that they should have $2.50 an acre?

Mr. MANN. Absolutely no such agreement was ever entered into, nor was anybody empowered to make such an agreement. Does the gentleman from Texas undertake to say that an Indian agent can go out to an Indian tribe and make an agreement which is binding, where the law requires that Congress shall act? Do I understand that a subordinate in the Indian Office, in the opinion of the gentleman, can go out and make an agreement as to the amount of money that Congress shall pay for land? I never have heard such a preposterous proposition seriously put forward before in the House.

Mr. STEPHENS of Texas. That has been the practice for years.

Mr. MANN. I beg the gentleman's pardon.

Mr. STEPHENS of Texas. The Indians agreed that they would permit the lands to be sold at a stated price, and we would be violating the faith of the Government with those Indians by taking the lands from them unless we pay them that amount.

Mr. DOUGLAS. They do not have to take $1.25 an acre, do they, unless they want to?

Mr. STEPHENS of Texas. Should we not keep a promise made to the Indians as faithfully as a promise made by the Government of the United States to one of its own citizens?

Mr. MANN. There has been no promise made. Why does the gentleman keep stating that?

Mr. STEPHENS of Texas. Then the agent of the Government, Major McLaughlin, is directly contradicted by the gentleman from Illinois.

Mr. MANN. I say the gentleman is mistaken about that.

Mr. STEPHENS of Texas. I always prefer to believe the gentleman from Illinois on questions concerning which he is posted, but he certainly does not know what contracts Major McLaughlin made with these Indians.

Mr. MANN. I know as much about it as the gentleman from Texas does. We both get our information from the same source. I have read the statement. I wonder if the gentleman from Texas has. I doubt it.

Mr. BURKE of South Dakota. Will the gentleman from Illinois allow me to enlighten him?

Mr. MANN. Certainly.

Mr. BURKE of South Dakota. Section 12 of the agreement made with the Sioux Indians in 1889, dividing the Sioux Reservation into separate reservations and providing for the allotting of lands to the Indians, contains these words:

That any time after land has been allotted to all the Indians of any tribe as herein provided, or sooner, if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such tribe for the purchase and lease by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall from time to time consent to sell on such terms and conditions as shall be considered just and equitable

between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress.

Mr. MANN. Is that the law now?

Mr. BURKE of South Dakota. That is the law.

Mr. MANN. Then, what do you come here for? If they have the power now in the department to purchase the land at such price as they agree upon, what is the gentleman doing here?

Mr. BURKE of South Dakota. But it must be ratified by Congress. Now, the gentleman asked a moment ago by what authority Colonel McLaughlin was out there.

Mr. MANN. I beg the gentleman's pardon. I said nothing of the kind. The trouble with the gentleman is that he has been talking with somebody else and was not listening to what I said.

Mr. BURKE of South Dakota. I heard what the gentleman said.

Mr. MANN. What I said was that Colonel McLaughlin, if that is his title, had no authority to make an agreement with the Indians binding on the United States. Does the gentleman from South Dakota contend that he had the authority?

Mr. BURKE of South Dakota. Not unless it was ratified by Congress.

Mr. MANN. Had he the authority?

Mr. BURKE of South Dakota. He certainly had the authority to negotiate.

Mr. MANN. To make an agreement? If this man had authority to make an agreement, the gentleman from South Dakota would not be here with this bill. All that

he was authorized to do was to tell them what he would endeavor to do. No negotiator had the authority to make an agreement binding on the United States, and they well understood it, because they made no binding agreement, and did not pretend to.

Mr. BURKE of South Dakota. They did, subject to its ratification by Congress.

Mr. MANN. They recommended to Congress. There is no question of fact between the gentleman from South Dakota and myself. The Indian agent recommended to Congress the payment of $2.50 an acre. He told the Indians that he would recommend the payment of $2.50 an acre, and that is all he did. That recommendation was laid before Congress. It may be that Congress has no authority, moral or legal, to override the opinion of this Indian inspector, but somehow or some way it did do it, and with all these opinions before Congress, Congress did not choose to follow the recommendation of the Indian agent as to this price and provided otherwise under the lead of the present Vice-President of the United States.

Mr. BURKE of South Dakota. Does the gentleman from Illinois wish to be understood as saying that the Government ought to disregard these negotiations, which practically amount to an agreement, for the sake of saving $1.25 an acre on a small area of land, where the proceeds are going to be used for the support and civilization of the Indians?

Mr. MANN. That question reminds me of the question that is sometimes put to an expert witness. It is so long I forgot what the first of it was before the

gentleman finished. But I will say to the gentleman, of course we do regard any statement that the Indian agents make. We have regarded it and considered it; we have given it all the force it is entitled to, and we have overruled it by the legislation which we enacted, as we had a right to enact.

Now the gentleman wants Congress to overrule itself, on the ground that it did not know what it was doing when it disregarded the opinion of the Indian agent. Do I understand that the gentleman appeals from Congress to the Indian agent? That is a new supreme court—appealing from the action of the House to the opinion of a subordinate officer in the Indian department.

Mr. STEPHENS of Texas. Will the gentleman answer a question?

Mr. MANN. I will yield to the gentleman.

Mr. STEPHENS of Texas. The two contracting parties are the Indian tribes and the United States Government. Is not that true?

Mr. MANN. I am not on cross-examination, and the gentleman can make his own statement.

Mr. STEPHENS of Texas. That being true, then, the minds of the two parties must have met to make a contract. The Indians never agreed to take less than $2.50 an acre, and what right has Congress to say that they shall take $1.25 an acre? Shall we exercise the right of the giant and pay these Indians less than half they agreed to sell for, when they have never agreed to take less than $2.50? Let us be fair and just to the Indians.

Mr. MANN. Oh, the gentleman always ends his speech with that. I do not care whether the Indians take this $1.25 or not. I am perfectly willing that they should continue to keep this land; but bring this whole proposition in before the House again, and not bring in a part of it. It is an effort to amend a particular section of a bill, because it happens that that opens the door of the Treasury and is against the Government, without amending any of the sections of the bill which might be so amended as to protect the Government; that I protest against. The gentleman himself does not wish to repeal the other sections of the act and neither do the Indians. They would far rather have that act stand as it is without an amendment than to have it repealed.

Mr. McGUIRE of Oklahoma. Will the gentleman permit another question?

Mr. MANN. Oh, I am good-natured and am willing to yield all the time.

Mr. McGUIRE of Oklahoma. The gentleman stated in the outset that the Government would keep its agreement, but the Indians should also keep their agreement. Will the gentleman advise the House where these Indians have not kept their agreement with the Government?

Mr. MANN. If the Indians accepted this act—and I understand they have accepted it and appointed a commission under it—

Mr. McGUIRE of Oklahoma. They had no alternative.

Mr. MANN. They had no alternative? Ah, ha, that is another proposition. If they have accepted the act, as they have, then they ought to keep the agreement in the act, and not attempt to break that part of it which does not happen to suit them. Let it stand as a whole or fall as a whole.

Mr. SAUNDERS. Mr. Chairman, I dislike to occupy the time of the House again this afternoon, but this is a matter that comes from the committee of which I am a member, and I am entirely familiar with it. This is a very simple question. It is a mere question of the application of the ordinary principles of good faith to a contract. That is all, nothing more and nothing less. We made an agreement with these Indians so far as we can make an agreement with an Indian tribe. Now, the gentleman from Illinois [Mr. Mann] in one respect is technically correct. No agreement, however solemn, can be made with the Indians with respect to which we have not reserved to ourselves the high prerogative of overruling it, that is, breaking it. To that extent he is right. But in this instance we went ahead, and made an agreement with these Indians, which they recognized as affording the terms upon which they parted with their land. They dealt with a representative of this Government, and they thought that as a consideration for what they were surrendering, they would receive $2.50 per acre for the lands, covered by the contract. It is the government agents who testify to this effect, and not the Indians, and it is the government agents who inform us of dissatisfaction on the part of

the Indians, because we have not carried out our contract with them.

We have the brutal power to say that we will not pay these Indians anything for their land. But shall we exercise this power? Economy is all right, but economy practiced at the expense of good faith, is not a very desirable policy to pursue [applause], nor are its results to be held as a very precious possession on the part of this great Government. When contracting parties are equal, and keep faith, it is regarded as a matter of credit to the parties. How much more to our credit will it be, to keep faith, when we deal with our helpless, dependent, domestic wards? That is the whole proposition here. We have agreed to give them $2.50, and we have not given it to them, and this bill proposes that we shall now do, what we ought to have done at the last session of Congress.

Mr. MANN. Will the gentleman yield for a question, as affecting the matter of good faith?

Mr. SAUNDERS. Certainly.

Mr. MANN. Did not the gentleman make this statement to the House at the time this bill passed the House before by more than a two-thirds vote?

Mr. SAUNDERS. It did not pass by more than a two-thirds vote according to my recollection.

Mr. MANN. Well, it did, and the gentleman is mistaken about that.

Mr. SAUNDERS. It is not my recollection that it did, but a two-thirds vote does not make right that which is wrong. [Applause.]

Mr. MANN. The House was fully advised at that time.

Mr. SAUNDERS. I do not know how many people were in the House, or whether they were fully advised, or not.

Mr. BURKE of South Dakota. Will the gentleman permit me to state what the vote was? It was 139 ayes, noes 70.

Mr. SAUNDERS. Then, that is not two-thirds.

Mr. MANN. Why, it is two-thirds; and the gentleman is still mistaken.

Mr. SAUNDERS. Twice 9 is 18 and twice 7 is 14 and 1 is 15—

Mr. MANN. Oh, the gentleman is assuming that two-thirds means twice as many.

Mr. SAUNDERS. I do.

Mr. MANN. Then the gentleman has another arithmetical computation coming.

Mr. SAUNDERS. I assume the gentleman meant by his statement that there were twice as many votes for the proposition as against it.

Mr. MANN. What I said was that two-thirds voted for it, did I not?

Mr. SAUNDERS. I do not know what the gentleman had in mind. That is what I had in mind. However, that is irrelevant and immaterial anyway.

Mr. MANN. But the gentleman is as far mistaken now, as he was about the other proposition.

Mr. SAUNDERS. I was trying to find out what the gentleman meant. I am not mistaken in my recollection

of the merits of this proposition, and I will try to inform the House as to them in a moment. It is true that a recommendation to pay $2 per acre came before the House, and from the committee, but it came over the protest of quite a number of the members of that committee. The House committee agreed to put the compensation for these lands at $2 per acre instead of $2.50, as provided for in the Senate. How this got to be $1.25, in the final form, I do not understand. I do not know any more about that than the gentleman knows. The committee understood that it was to be $2, and I was opposed to that reduction of the agreed amount. It was my recollection that the House voted $2 last year, and not $1.25. However that may be, I want to present the merits of the pending proposition. Major McLaughlin was the representative of the Government, in the negotiations with the Indians. He states that the Indians understood that they were to receive $2.50 for their land. The agreement as reproted to us provided for $2.50. The Indians turned over whatever rights they had, in consideration of that undertaking on our part. We can not undertake to say that we were overreached; we can not say we were misled; we can not say that the consideration has failed, because the land is worth far more than the $2.50 per acre, but what difference does it make whether it is worth less, or more? Even if it was worth less, still we agreed to take it on the terms contained in our understanding with the Indians. Shall we exercise our brute force, and override this agreement,

merely because we can do it, and for no better reasons than those so far advanced on the floor of this House?

Sometimes, Mr. Chairman, a man whose note is out of date, but who is amply able to pay every dollar of it, settles his liability at 50 cents on the dollar. That man is not regarded very highly in the world of honorable men, but his attitude is preferable to the course recommended to us. If we undertake to settle at $1.25 an acre, then we are discharging our obligation at 50 cents on the dollar. We will pay $1.25 an acre for land that on an average is worth $5 an acre, and for which we agreed to pay $2.50 per acre. Our ability to pay is infinite, and our contract is still in full force—I was about to say "and virtue," but some gentlemen here do not seem to think that there is much virtue in keeping faith with dependent Indians. But here is the contract and nothing has ever emanated from the Indians to indicate that they have been satisfied with their treatment. They have protested from the beginning.

Mr. DOUGLAS. Will the gentleman yield for an interruption there for him to give me some information?

Mr. SAUNDERS. I will afford the information, if I can.

Mr. DOUGLAS. I was not in the House at the time this bill passed. The gentleman from Illinois has stated, in the presence of the House, that the act contained a number of provisions, some of which were favorable to the Indians and some to the Government, but that the act as a whole was substantially accepted by the Indians by their acting under it.

Mr. SAUNDERS. What else could they do?

Mr. DOUGLAS. But there was an agreement by a commission, or something of that kind. I suggest simply, if that be true, and the Indians have substantially accepted this in view of other benefits contained—

Mr. SAUNDERS. I will answer that in this way: If a party who is able to accept a contract, or to reject it was a whole, accepts it in a modified form, he will be bound by his acceptance. But this is in the case of a free agent. In such a case, when he acts under a contract with modifications, his conduct will be taken as evidence that he has agreed to the modifications, and he will be bound by the contract in its modified form. But this principle does not apply to the case in hand. The Indians could do nothing else but what they did, and they have protested from the very beginning that they were not receiving that which the Government had contracted to give them. Up to the present it has been a matter of $1.25 per acre, or nothing.

The evidence is here in the report before us that the Indians have objected to our breach of faith, and complained that they were not receiving the agreed consideration. All that the Indians were to receive as a consideration for the lands ceded was the price of $2.50 per acre, for a portion of their lands. Talk about the Indians keeping faith with respect to the other matters, wherein have they failed to keep faith? I defy anyone to point out any particular in respect to which they have broken faith.

Mr. KEIFER. I would like to ask a simple question. Would it have been possible for the Indians to have rejected this law?

Mr. SAUNDERS. Not at all. What else could they do, than what they have done? They accepted a situation that they could not amend, correct, or reject. An acceptance of that sort should not cause a man, or a body of men, to lose their contract rights.

Mr. KEIFER. In other words, the United States passed a law, and proceeded to execute it?

Mr. SAUNDERS. Yes, by virtue of brute force. In substance we have said to these Indians by the act of a year ago, something like this: "It is true we have taken your lands and opened your reservation. It is true you have kept the faith on your part. It is true that we agreed to give you $2.50 per acre for your lands, and that these lands are worth about $5 an acre. All of this is true, but we have now determined that we will cancel this agreement, retain your land, and pay you only $1.25 per acre." We proceeded to break faith with the Indians by the exercise of our paramount authority, and it is not much to our credit that we have done so. In conclusion, I repeat what I said in the beginning that the question before us is merely the application of the ordinary principles of honesty, fair dealing, good faith, and integrity, to our dealings with our domestic wards. That is all. [Applause.]

Mr. BURKE of South Dakota. Mr. Chairman, I call for a reading of the bill.

The CHAIRMAN. The Clerk will report the bill.

The Clerk read as follows:

[The text of the bill appears here.]

Mr. MANN. Mr. Chairman, I move to strike out the enacting clause.

The CHAIRMAN. The question is on the motion of the gentleman from Illinois [Mr. Mann].

The question was taken, and the motion was rejected.

Mr. BURKE of South Dakota. Mr. Chairman, I move that the committee do now rise and report the bill to the House with a favorable recommendation.

The motion was agreed to.

Accordingly the committee rose; and the Speaker having resumed the chair, Mr. PERKINS, chairman of the Committee of the Whole House on the state of the Union, reported that that committee had had under consideration the bill, H.R. 12438, and had instructed him to report the same to the House with the recommendation that the bill do pass.

The bill was ordered to be engrossed and read a third time, was read the third time, and passed.

45 Cong. Rec. 1647 (Senate, February 9, 1910)

CHEYENNE RIVER AND STANDING ROCK LANDS

The bill, (H.R. 12438) to amend sections 7 and 8 of the act of May 29, 1908, entitled "An act to authorize

the sale and disposition of a portion of the surplus and unallotted lands in the Cheyenne River and Standing Rock Indian reservations, in the States of South Dakota and North Dakota, and making appropriation and provision to carry the same into effect," was considered as in Committee of the Whole.

The bill was reported from the Committee on Indian Affairs with an amendment, on page 2, line 20, after the word "settlement," to strike out the proviso in the following words:

Provided, That in any event not more than 2 sections shall be granted to the State in any one township, and lands must be selected in lieu of sections 16 or 36, or any part thereof, within the township in which the loss occurs, except in any township where there may not be 2 sections of unallotted lands, in which event whatever is required to make 2 sections may be selected in any adjoining township.

The amendment was agreed to.

Mr. GAMBLE. I propose an amendment to be placed after the word "respectively," in line 18, on page 3.

The VICE-PRESIDENT. The Secretary will read the amendment.

The SECRETARY. On page 3, line 18, after the word "respectively," insert the following additional proviso:

Provided further, That the lands allotted, those retained or reserved, and the surplus lands sold, set aside for town-site purposes, or granted to the said States or otherwise disposed of under the provisions of this act shall be subject for a period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country.

The amendment was agreed to.

The bill was reported to the Senate as amended, and the amendments were concurred in.

The amendments were ordered to be engrossed, and the bill to be read a third time.

The bill was read the third time, and passed.

Mr. GAMBLE. I call attention to order of business 36 under Rule IX, the bill (S. 3286) to amend sections 7 and 8 of the act of May 29, 1908 (35 Stat. L., p. 460), entitled "An act to authorize the sale and disposition of a portion of the surplus and unallotted lands in the Cheyenne River and Standing Rock Indian reservations, in the States of South Dakota and North Dakota, and making appropriation and provision to carry the same into effect."

I move the indefinite postponement of the Senate bill for the reason that House bill No. 12438, which has just passed the Senate, covers the identical proposition.

The motion was agreed to.

45 Cong. Rec. 1769-70 (House, February 11, 1910)

CHEYENNE RIVER AND STANDING ROCK INDIAN RESERVATIONS

The Speaker laid before the House the bill (H.R. 12438) to amend sections 7 and 8 of the act of May 29, 1908, entitled "An act to authorize the sale and disposition of a portion of the surplus and unallotted lands in the Cheyenne River and Standing Rock Indian reservations, in the States of South Dakota and North Dakota, and making appropriations and provisions to carry the same into effect," with Senate amendments thereto.

The Senate amendments were read.

Mr. BURKE of South Dakota. Mr. Speaker, I move to concur in the Senate amendments.

Mr. MANN. Mr. Speaker, may I ask the gentleman a question? This amendment is in reference to intoxicating liquors. Will it forbid the introduction of intoxicating liquors into the land after it is opened?

Mr. BURKE of South Dakota. Mr. Speaker, the amendment relating to prohibition of intoxicating liquors in the Indian country will prohibit the sale of liquor or the introduction of liquor into that country for twenty-five years; that is, the land affected by the bill, namely, the portion of the so-called "Standing Rock Indian Reservation," in South Dakota, authorized to be disposed of under the law that this bill proposes to amend.

Mr. STAFFORD. Will the gentleman permit a question?

Mr. BURKE of South Dakota. Yes.

Mr. STAFFORD. Is this amendment of the Senate a new provision in this character of legislation?

Mr. BURKE of South Dakota. Mr. Speaker, I would say in answer to that inquiry that it is not; that this is a provision which has been in a number of bills that have passed the House or become a law recently upon the subject of the disposition of Indian lands.

Mr. STAFFORD. Do I understand the gentleman to hold that in the opening of all Indian reservation lands there has been such a provison restricting the sale of liquor for twenty-five years?

Mr. BURKE of South Dakota. Not in all cases; no, sir.

Mr. STAFFORD. What is the special reason why there should be this limitation in this instance?

Mr. BURKE of South Dakota. I stated that this provision had been in a number of bills that have passed in recent years dealing with the disposition of Indian lands. I have in mind the Yankton Reservation, in South Dakota, which was opened to settlement in 1892 or 1895; and in that legislation there is a provision prohibiting the sale of liquor for all time in the country that was affected by the legislation.

Mr. STAFFORD. May I ask where the lands are, in what States, that will be covered by this limitation?

Mr. BURKE of South Dakota. In South Dakota.

Mr. STAFFORD. In South Dakota there is no constitutional inhibition forbidding the sale of liquor, while in North Dakota there is, and whereas it might be pertinent in the case of the reservation at Yankton, it might not be pertinent in land in South Dakota.

Mr. BURKE of South Dakota. I will say to the gentleman that this provision has been in several bills, I think in one or two in Montana, and if I am not mistaken one in Washington.

Mr. STAFFORD. Is it the purpose of the amendment to seek to determine the internal policy, as far as the prohibition question is concerned, on land that is to be opened up to settlement?

Mr. BURKE of South Dakota. That is the purpose of it.

Mr. STAFFORD. I wish to dissent strongly from such a position. I think the internal policy of the local

government should not be determined by Congress on the liquor question, but it should be reserved for the State; that so far as land open to settlement in a State where they have constitutional prohibition is concerned there might be some reason for the exception and limitation. But in States where they do not have a constitutional prohibition, for us to limit in the grant of settlement for twenty-five years, or for any period of time, that the occupants shall be restricted in the use of intoxicating liquors seems to me to be a departure from the proper province of legislation by Congress.

Mr. BURKE of South Dakota. Mr. Speaker, I desire to make a statement in response to the statement made by the gentleman from Wisconsin. It has always been the policy of the Government to prohibit the introduction of liquor into the Indian country.

In the tract affected by this legislation the Indians have taken allotments, and one-third, perhaps, if not more, of the tract has been allotted to the Indians. The allotments run for twenty-five years, and it is the theory of the committees having jurisdiction of Indian legislation that during the trust period, at least, and while these Indians will be in that country holding allotments, the laws relative to the introduction of liquor into the Indian country shall be extended into that country. That is the purpose of this legislation.

Mr. STAFFORD. May I ask whether, as to all of the Indian reservations open to settlement, there were not allotments made to the Indians?

Mr. BURKE of South Dakota. There were.

Mr. STAFFORD. Are there not many instances where there has been no limitation, so far as the prohibition of the sale of liquor is concerned?

Mr. BURKE of South Dakota. That is absolutely true, and because there was no legislation such as I have named is the principal reason for undertaking to legislate now.

Mr. STAFFORD. I suppose instances might be cited without number of lands in the earlier history of the country that have been opened to settlement and where the Indians have taken allotmentts where the Government has not undertaken to determine the internal policy of the country, but has left it to the State to determine what was the best policy. Take the Yankton Indian Reservation case instanced by the gentleman. A limitation for all time was inserted in the grant when South Dakota had a constitutional prohibition law. Since then the constitution has been amended, so there is today license under local option. Yet in the reservation land that policy of local self-government does not prevail because of the restrictive clause that may have become out of date with present conditions. There is no reason why there should be, in the first instance, a limitation forbidding the sale of liquor. I, for one, believe that we are establishing a bad precedent in this instance in undertaking to determine the policy of a State in advance—to determine for twenty-five years the policy of that State, so that the people of the State can not pass upon the question and adopt that policy best suited to local conditions.

Mr. SABATH. Will the gentleman allow me a question?

Mr. BURKE of South Dakota. Certainly.

Mr. SABATH. Has such limitation been made heretofore on lands open to settlment?

Mr. BURKE of South Dakota. Yes; and I have already so stated.

Mr. SABATH. When?

Mr. BURKE of South Dakota. As early as 1892, I think it was, a bill passed opening that portion of the country in South Dakota then known as the "Yankton Indian Reservation." There was a provision similar to this one and it was for all time.

Mr. SABATH. That was only to the reservation of the land reserved for the Indians.

Mr. BURKE of South Dakota. It was to the country affected by the legislation, the land to be opened for settlement.

Mr. SABATH. All of the land?

Mr. BURKE of South Dakota. All of the land.

Mr. STAFFORD. I think the gentleman from South Dakota must admit that there was some special reason for making such a limitation in that case because South Dakota at that time had a constitutional provision forbidding the sale of liquor in the entire State, and for that reason the policy of the Government was to permit the state policy to control.

Mr. BURKE of South Dakota. This identical provision has been incorporated in several bills that have passed this House disposing of lands belonging to the

Indians and without regard to whether or not the reservation was in a State which had constitutional prohibition or not. And there is pending at the present time an amendment to legislation that was passed in a recent Congress relating to a reservation in the State of Washington, the Yakima Reservation, reported to-day by the Committee on Indian Affairs, to put in that law this very section and brought to the attention of the committee by one of the Senators and one of the Representatives from the State of Washington, they believing that in the interest of the Indians, as well as in the interest of the white population of that State, this provision relating to the introduction and sale of liquor ought to be enacted and made a part of the law authorizing a sale of the surplus lands in that reservation.

Mr. MANN. Will the gentleman yield for a question?

Mr. BURKE of South Dakota. Certainly.

Mr. MANN. Did we not put something of the sort in the enabling act for the admission of Oklahoma into the Union, so far as the Indian lands were concerned or the territory embraced in the former Indian lands?

Mr. STEPHENS of Texas. We did.

Mr. BURKE of South Dakota. My understanding is that we did.

Mr. MANN. That was a very formal action even in admitting a State into the Union in limiting its power to prevent the sale of intoxicating liquors.

Mr. STAFFORD. But that part referring to the Indian Territory was mainly occupied by Indians. There

is no one who desires to force liquor upon the Indians, but the internal policy should be determined by the State.

Mr. STEENERSON. This is not a new provision, but a very old one. I understand the committee now provides for doing what we did in the treaty of 1855, under which Minnesota obtained her Indian lands, and the Interior Department is now enforcing the provisions of the treaty of 1855 as to all of northern Minnesota, which has not been Indian lands for over fifty years.

Mr. BURKE of South Dakota. That is true. Mr. Speaker, I call for a vote.

The SPEAKER. The question is on agreeing to the amendments.

The question was taken, and the amendments were agreed to.

BRIEF OF UNITED STATES, AMICUS CURIAE

IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 72-1529
Criminal

UNITED STATES OF AMERICA EX REL
TILDEN LOUIS CONDON,

Appellee

vs.

(DON R. ERICKSON, WARDEN OF THE
SOUTH DAKOTA STATE PENITENTIARY,)

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH DAKOTA, SOUTHERN DIVISION

The Honorable Fred J. Nichol,
Chief Judge, United States District Court

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The Honorable Fred J. Nichol,
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BRIEF OF UNITED STATES, AMICUS CURIAE

PRELIMINARY STATEMENT

In this brief reference to the Appellee, Tilden Louis Condon, will be by use of the word "appellee". Reference to the Appellant, Don R. Erickson, Warden of the South Dakota State Penitentiary, will be by the use of the words "The State of South Dakota". Reference to the Amicus Curiae, the United States of America, will be by the use of the word "government". The Act of May 29, 1908, 35 Stat. 460, "An Act to Open to Settlement Surplus or Unallotted Lands in Cheyenne River and Standing Rock Indian Reservations" will be referred to as "the 1908 Act".

STATEMENT OF FACTS

The Petitioner, Tilden Louis Condon, is an enrolled member of the Cheyenne Indian Tribe. He had been jailed prior to November 2, 1964 for a tribal offense of intoxication. Condon was granted permission to leave tribal jail during the time his sentence was being served for a medical doctors appointment. He did not return to the jail but was later arrested and gave confessions about the rape of a 70 year old woman who was librarian within the town site of Eagle Butte and was the victim in the rape case. He was also identified by her.

The U.S. Attorney commenced proceedings against Condon based upon Federal jurisdiction. This indictment was later dismissed and the State assumed jurisdiction of Condon. Condon pled guilty to the State of South Dakota charge of rape on August 12, 1965. The jurisdictional aspect of this matter was not resolved in the first appeal of Condon to the Circuit Court. See *United States ex rel Condon v. Erickson*, 459 F2d 663 (8th Cir. 1972).

ISSUE

The issue in this case is whether Eagle Butte, situs of the rape, is Indian country under 18 U.S.C. §1151 and whether the

1908 Act opening areas of the Cheyenne River Reservation for homesteading was a diminishment of the reservation.

STATEMENT OF POINTS TO BE ARGUED AND AUTHORITIES RELIED ON

I.

CONGRESS INTENDED TO DIMINISH THE BOUNDARIES OF THE CHEYENNE RIVER INDIAN RESERVATION BY THE ACT OF 1908.

Act of May 29, 1908, 35 Stat. 460

United States v. LaPlant, 200 F. 92 (8th Cir. 1911)

Act of Feb. 2, 1903, 32 Stat. 793

State v. Barnes, 81 S.D. 511, 137 N.W.2d 683 (1965)

Lafferty v. State, 80 S.D. 411, 125 N.W.2d 171 (1963)

State v. Jameson, 77 S.D. 527, 95 N.W.2d 181 (1959)

Swanson v. J. L. Shiely Co., 48 N.W.2d 848 (Minn. 1951)

Putnam v. United States, 248 F.2d 292 (8th Cir. 1957)

United States of America ex rel Tilden Louis Condon v. Don R. Erickson, Warden of the South Dakota State Penitentiary, United States District Court, District of South Dakota, Southern Division, CIV 71-175, Memorandum Decision, June 27, 1972

United States v. Pelican, 232 U.S. 442 (1914)

II.

THE SEYMOUR AND NEW TOWN DECISIONS ARE NOT CONTROLLING IN THIS CASE.

Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 35 (1962)

City of New Town, North Dakota v. United States, 454 F.2d 121 (8th Cir. 1972)

Act of March 22, 1906, 34 Stat. 80

Act of June 1, 1910, 36 Stat. 455

ARGUMENT

I

CONGRESS INTENDED TO DIMINISH THE BOUNDARIES OF THE CHEYENNE RIVER INDIAN RESERVATION BY THE ACT OF 1908.

That Congress intended to diminish the Cheyenne River Indian Reservation is clear from the provisions of the 1908 Act. In Section 2 of the 1908 Act Congress provided:

> That prior to said proclamation the Secretary of the Interior, in his discretion, may permit Indians who have an allotment within the area described in section one of this act to relinquish such allotment and to receive in lieu thereof an allotment *anywhere within the respective reservations thus diminished* to which reservation the said Indians may belong . . . (emphasis supplied).

In Section 9 of the 1908 Act Congress provided:

> That Indians residing upon their allotments in townships sixteen north of ranges twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty, and thirty-one east shall have the right to use timber in said townships, except on sections sixteen and thirty-six for domestic purposes only as *long as the lands remain part of the public domain.* (emphasis supplied).

The Eighth Circuit Court of Appeals in the case of *United States v. LaPlant*, 200 F. 92 (8th Cir. 1911), directly ruled on the effect of the 1908 Act upon the boundaries of the Cheyenne River Indian Reservation. Referring directly to that particular portion of Sec. 2 of the 1908 Act which is quoted above the Court in *LaPlant* held:

> No other meaning can be given to the words italicized [thus diminished] than that the reservations were diminished, and they were diminished by the Act itself . . . It appears, therefore, that Congress intended to diminish the reservations at the time the act was passed . . . *United States*

v. LaPlant, supra, at p. 94.

In *LaPlant* the Court was dealing with federal criminal jurisdiction over unallotted lands located within the boundaries of the Cheyenne River Indian Reservation as they existed prior to the 1908 Act. The jurisdictional statute conferred jurisdiction on the federal courts in South Dakota over particular offenses committed by any person "within the limits of any Indian Reservation within the state of South Dakota". Act of Feb. 2, 1903, 32 Stat. 793.

A construction of the Act of 1908 similar to that of the Court of Appeals in *LaPlant* has been adopted by the Supreme Court of South Dakota in two cases. *State v. Barnes*, 81 S.D. 511, 137 N.W.2d 683 (1965); *Lafferty v. State*, 80 S.D. 411, 125 N.W.2d 171 (1963). In addition, while construing a similar act of Congress dealing with the Pine Ridge Indian Reservation, the South Dakota Supreme Court in *State v. Jameson*, 77 S.D. 527, 95 N.W.2d 181 (1959) held that the state courts had jurisdiction over lands in the "opened" portion of the Pine Ridge Indian Reservation.

It is submitted that the construction of the Act of 1908 by the Court in *LaPlant* is a reasonable construction which is entitled to great weight in determining the case at hand. In *LaPlant* the Court recognized that "It is important to definitely know over what land the state courts have jurisdiction and over what lands the federal courts have jurisdiction . . . ". *United States v. LaPlant, supra,* at p. 94.

The Supreme Court of Minnesota in the case of *Swanson v. J. L. Shiely Co.*, 48 N.W.2d 848 (Minn. 1951), stated:

> We therefore approach the solution of the questions presented, not as to a case of first impression, but by applying to the problem the interpretation which this Court has previously spelled out . . . To do otherwise now and to

> give a different interpretation to it would be to subject the court to merited criticism that its opinions were good only for the day and case. Our opinions are not only a guide to the lower courts and binding upon them, but the law of this state is what we say it is when the federal courts are called upon to interpret and apply it. Therefore, we should be consistent in our construction of our laws. Our decision should establish stable interpretation, *especially as to legislative intent.* (emphasis supplied) *Swanson v. J. L. Shiely Co.*, 48 N.W. 2d at 852 (Minn. 1951).

In the case of *Putnam v. United States*, 248 F.2d 292 (8th Cir. 1957), the Court stated that:

> The defendants' contentions find some support in *United States v. LaPlant*, D.C.S.D. 1911, 200 F. 92, holding that the Indian title to a portion of an Indian Reservation in South Dakota had been extinguished by being opened to settlement under an Act similar to the Wheeler-Howard Act with which we are concerned. The *LaPlant* case was a criminal case, and the question decided was one of jurisdiction over a murder committed on unallotted land which it was held had been excluded from the limits of the Reservation. The case is distinguishable from, and in any event not controlling in, the instant case. We think that the *LaPlant* case, in so far as it is of any aid or comfort to the defendants, has been overruled by *United States v. Pelican, supra*, 232 U.S. 442, 447, 34 S.Ct. 396, 58 L.Ed. 676. *Putnam v. United States, supra*, at 295.

A careful reading of the *Putnam*, *Pelican* and *LaPlant* decisions reveals that the validity of the *LaPlant* decision was questioned in *Putnam* only in so far as it could potentially be construed as holding that Indian title to allotted lands in the "opened portion" of the Cheyenne Indian Reservation was extinguished by the Act of 1908. A review of the *LaPlant* decision in connection with the Act of 1908 gives little credence to such a construction. It is important in this connection to emphasize that in *LaPlant* the Court was dealing with a criminal statute establishing federal jurisdiction "within the limits of any Indian Reservation within the state of South

Dakota". Act of Feb. 2, 1903, 32 Stat. 793. The *LaPlant* court stated that:

> The question, therefore, is whether or not on the 20th day of March, 1911, when this offense was committed, the place where it was committed was within an Indian Reservation. *United States v. LaPlant, supra,* at 93.

The question of the status of allotted lands was not dealt with.

The construction of the Act of 1908 by the court in *LaPlant* has been followed by the State of South Dakota and the Government for a period of about 71 years. The sweeping effects of a contrary holding at this time upon the administration of justice within the state and federal levels in South Dakota is apparent and is magnified by the existence of similar statutes with reference to other Indian Reservations in South Dakota. It is submitted that the *LaPlant* construction of Congressional intent with reference to the Act of 1908 is a proper construction and should be upheld by this court. As illustrated in the Memorandum Decision of Judge Nichol such a construction finds support in the "subsequent congressional treatment of the reservation". *United States of America ex rel Tilden Louis Condon v. Don R. Erickson, Warden of the South Dakota State Penitentiary,* United States District Court, District of South Dakota, Southern Division, CIV 71-175, Memorandum Decision, June 27, 1972 at page 4-5.

II.

THE SEYMOUR AND NEW TOWN DECISIONS ARE NOT CONTROLLING IN THIS CASE.

That the cases of *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962) and *The City of New Town, North Dakota v. United States*, 454 F.2d 121 (8th Cir. 1972) are not controlling is apparent from a comparison of the

Act of 1908 with the Act of 1906, 34 Stat. 80 and the Act of June 1, 1910, 36 Stat. 455 all of which are set forth in the appendix to the government's brief.

In *Seymour* the Court stated that:

> Nowhere in the 1906 Act is there to be found any language similar to that in the 1892 Act expressly vacating the South Half of the reservation and restoring that land to the public domain. Quite the contrary, the 1906 Act repeatedly refers to the Colville Reservation in a manner that makes it clear that the intention of Congress was that the reservation should continue to exist as such. *Seymour v. Superintendent, supra*, at p. 355.

In *New Town* the Court of Appeals held that, "The 1910 Act clearly by its own terms does not purport to alter the reservation boundaries." *City of New Town v. United States, supra*, at p. 125.

Such is not the case with the Act of 1908. As pointed out above the Act of 1908 expressly refers to the reservation "thus diminished" and to the lands as part of the "public domain" and is consistent throughout its terms with a Congressional intent to diminish the boundaries of the Cheyenne River Indian Reservation.

CONCLUSION

It is the position of the Federal Government that this factual situation, unlike *Seymour*, does not result in a jurisdictional dispute which might hamstring or hamper law enforcement. The history of city and state law enforcement in Eagle Butte has been based on the earlier decisions. To now add this area to Federal jurisdiction would not, in our opinion, be a proper move in view of the reasoning or an extension of the former reasoning of State and Federal courts which was based on the cases that are now sought to be distinguished by

opposing counsel. It seems to us it is unnecessary that there be a physical redrawing of the boundaries as this has been done by implication in the former decisions. Thus, it is our opinion that there was and remains state jurisdiction in the area diminished on the Cheyenne Indian Reservation. We have seen nothing persuasive that would lead us to believe that the state's jurisdiction should not remain and we further request that as the court takes its careful, reasoned consideration of this case, it bear in mind that there are other reservations, the Sisseton-Wahpeton as an example, where the court's decision, if not controlling as to those reservations, may create an opportunity for further litigation and questions. We hope this court will recognize those possible problems and consider them even though not directly before the court in this case.

Respectfully submitted,

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November, 1972

APPENDIX "A"

Act of March 22, 1906, 34 Stat. 80

–An Act To authorize the sale and disposition of surplus or unallotted lands of the diminished Colville Indian Reservation, in the State of Washington, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell or dispose of unallotted lands in the diminished Colville Indian Reservation, in the State of Washington.

Sec. 2. That as soon as the lands embraced within the diminished Colville Indian Reservation shall have been surveyed, the Secretary of the Interior shall cause allotments of the same to be made to all persons belonging to or having tribal relations on said Colville Indian Reservation, to each man, woman, and child eighty acres, and, upon the approval of such allotments by the Secretary of the Interior, he shall cause patents to issue therefor under the provisions of the general allotment law of the United States.

Sec. 3. That upon the completion of said allotments to said Indians the residue or surplus lands–that is, lands not allotted or reserved for Indian school, agency, or other purposes–of the said diminished Colville Indian Reservation shall be classified under the direction of the Secretary of the Interior as irrigable lands, grazing lands, timber lands, mineral lands, or arid lands, and shall be appraised under their appropriate classes by legal subdivisions, with the exception of the lands classed as mineral lands, which need not be appraised, and which shall be disposed of under the general mining laws of the United States and, upon completion of the classification and appraisement, such surplus lands shall be open to settlement and entry under the provisions

of the homestead laws at not less than their appraised value in addition to the fees and commissions now prescribed by law for the disposition of lands of the value of one dollar and twenty-five cents per acre by proclamation of the President, which proclamation shall prescribe the manner in which these lands shall be settled upon, occupied, and entered by persons entitled to make entry thereof: *Provided*, That the price of said lands when entered shall be fixed by the appraisement, as herein provided for, which shall be paid in accordance with rules and regulations to be prescribed by the Secretary of the Interior upon the following terms: One-fifth of the purchase price to be paid in cash at the time of entry and the balance in five equal annual installments to be paid in one, two, three, four, and five years, respectively, from and after the date of entry, and in case any entryman fails to make the annual payments, or any of them, promptly when due all rights in and to the land covered by his or her entry shall cease, and any payments theretofore made shall be forfeited and the entry canceled, and the lands shall be reoffered for sale and entry: *Provided further*, That the lands remaining undisposed of at the expiration of five years from the opening of the said lands to entry shall be sold to the highest bidder for cash, at not less than one dollar per acre, under rules and regulations to be prescribed by the Secretary of the Interior, and that any lands remaining unsold ten years after the said lands shall have been opened to entry may be sold to the highest bidder for cash without regard to the above minimum limit of price.

Sec. 4. That the said lands shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when and the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, and enter any of said lands except as prescribed in such proclamation: *Provided*, That the

rights of honorably discharged Union soldiers and sailors of the late civil and Spanish wars, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged.

Sec. 5. That all of said lands returned and classified as timber lands shall be sold and disposed of by the Secretary of the Interior under sealed bids to the highest bidder for cash or at public auction, as the Secretary of the Interior may determine, and under such rules and regulations as he may prescribe.

Sec. 6. That the proceeds not including fees and commissions arising from the sale and disposition of the lands aforesaid, including the sums paid for mineral and town-site lands shall be, after deducting the expenses incurred from time to time in connection with the allotment, appraisment, and sales, and surveys, herein provided, deposited in the Treasury of the United States to the credit of the Colville and confederated tribes of Indians belonging and having tribal rights on the Colville Indian Reservation, in the State of Washington, and shall be expended for their benefit, under the direction of the Secretary of the Interior, in the education and improvement of said Indians, and in the purchase of stock cattle, horse teams, harness, wagons, mowing machines, horserakes, thrashing machines, and other agricultural implements for issue to said Indians, and also for the purchase of material for the construction of houses or other necessary buildings, and a reasonable sum may also be expended by the Secretary, in his discretion, for the comfort, benefit, and improvement of said Indians: *Provided*, That a portion of the proceeds may be paid to the Indians in cash per capita, share and share alike, if, in the opinion of the Secretary of the Interior, such payments will further tend to improve the condition and advance the progress of said Indians, but not otherwise.

Sec. 7. That any of said lands necessary for agency, school, and religious purposes, and any lands now occupied by the agency buildings, and the site of any sawmill, gristmill, or other mill property on said lands are hereby reserved from the operations of this Act: *Provided*, That all such reserved lands shall not exceed in the aggregate three sections and must be selected in legal subdivisions conformable to the public surveys, such selection to be made by the Indian agent of the Colville Agency, under the direction of the Secretary of the Interior and subject to his approval.

Sec. 8. That the Secretary of the Interior is hereby vested with full power and authority to make all needful rules and regulations as to the manner of sale, notice of same, and other matters incident to the carrying out of the provisions of this Act, and with authority to reappraise and reclassify said lands if deemed necessary from time to time, and to continue making sales of the same, in accordance with the provisions of this Act, until all of the lands shall have been disposed of.

Sec. 9. That nothing in this Act contained shall be construed to bind the United States to find purchasers for any of said lands, it being the purpose of this Act merely to have the United States to act as trustee for said Indians in the disposition and sales of said lands and to expend or pay over to them the net proceeds derived from the sales as herein provided.

Sec. 10. That to enable the Secretary of the Interior to survey, allot, classify, appraise, and conduct the sale and entry of said lands as in this Act provided the sum of seventy-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, from any money in the Treasury not otherwise appropriated, the same to be reimbursed from the proceeds of the sales of the aforesaid lands: *Provided*, That when funds shall have been procured from the first sales of the land the Secretary of the Interior may use such portion thereof as may be actually necessary in conducting future sales and

otherwise carrying out the provisions of this Act.

Sec. 11. That nothing contained in this Act shall prohibit the Secretary of the Interior from reserving from said lands, whether surveyed or unsurveyed, such tracts for town-site purposes, as in his opinion may be be required for the future public interests, and he may cause any such reservations, or parts thereof, to be surveyed into blocks and lots of suitable size, and to be appraised and disposed of under such regulations as he may prescribe, and the net proceeds derived from the sale of such lands shall be paid to said Indians, as provided in section six of this Act.

Sec. 12 That if any of the lands of said diminished Colville Indian Reservation can be included in any feasible irrigation project under the reclamation Act of June seventeenth, nineteen hundred and two, the Secretary of the Interior is authorized to withhold said lands from disposition under this Act and to dispose of them under the said relamation Act, and the charges provided for by said reclamation Act shall be in addition to the appraised value of said lands fixed as hereinbefore provided and shall be paid in annual installments as required under the said reclamation Act, and the amounts to be paid for the land, according to appraisement, shall be credited to the fund herein established for the benefit of the Colville Indians."

Approved, March 22, 1906.

APPENDIX "B"

Act of May 29, 1908, 35 Stat. 460

ACT TO OPEN TO SETTLEMENT SURPLUS OR UNALLOTTED LANDS IN CHEYENNE RIVER AND STANDING ROCK INDIAN RESERVATIONS

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell and dispose of all that portion of the Cheyenne River and Standing Rock Indian reservations in the States of South Dakota and North Dakota lying and being within the following described boundaries, to-wit: Beginning at a point on the one hundred and second meridian of longitude west, where the township line between townships nine and ten north intersects the same; thence east on said township line to a point where the same intersects the range line between ranges twenty-four and twenty-five east of the Black Hills meridian; thence north on said range line to a point where the same intersects the township line between townships fifteen and sixteen north; thence east along said township line to a point in the center of the main channel of the Missouri River; thence in a northerly direction along the center of the main channel of said Missouri River to a point where the township line between townships eighteen and nineteen north intersects the same, and including also entirely all islands, if any, in said river; thence west on said township line to a point where the range line between ranges twenty-two and twenty-three east intersects the same; thence north along said range line to the northwest corner of section nineteen in township twenty-one north of range twenty-three east; thence east on the section line north of sections nineteen, twenty, twenty-one, twenty-two, twenty-three and twenty-four to a point where the same intersects the range line between ranges

twenty-three and twenty-four east; thence north along said range line to the State line between the States of South Dakota and North Dakota; thence west on said State line to a point where the range line between ranges eighty-four and eighty-five west in North Dakota intersects the same; thence north on said range line to a point where said range line intersects the center of the main channel of the South Fork of the Cannon Ball River; thence in a westerly direction up and along the center of the main channel of the said river to a point where the same intersects the one hundred and second meridian of longitude west; thence south along said one hundred and second meridian of longitude west to the place of beginning, except such portions thereof as have been allotted to Indians: Provided, That sections sixteen and thirty-six of the lands in each township therein shall not be disposed of, but shall be reserved for the use of the common schools of the States of South Dakota and North Dakota, as the same may be located in the said States, respectively: Provided further, That the Secretary of the Interior may reserve such lands as he may deem necessary for agency, school, and religious purposes, to remain reserved as long as needed, and as long as agency, school, or religious institutions are maintained thereon for the benefit of said Indians: Provided, however, That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee simple to the duly authorized missionary board, or other proper authority of any religious organization heretofore engaged in mission or school work on said reservations, for such lands thereon (not included in any town site herein provided for) as have been heretofore set apart to such organization for mission or school purposes.

Sec. 2. That the lands shall be disposed of by proclamation under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which the lands may be settled

upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation: Provided, That prior to the said proclamation the Secretary of the Interior, in his discretion, may permit Indians who have an allotment within the area described in section one of this act to relinquish such allotment and to receive in lieu thereof an allotment anywhere within the respective reservations thus diminished to which reservation the said Indians may belong: Provided further, That prior to the said proclamation the Secretary of the Interior shall cause allotments to be made to every man, woman, and child belonging to or holding tribal relations in said Cheyenne River and Standing Rock Reservations who have not heretofore received the allotments to which they are entitled under provisions of existing laws: Provided further, That the Secretary of the Interior be, and he is hereby, authorized and directed to cause to be surveyed all the lands embraced within said reservations, and to cause an examination to be made of the lands by experts of the Geological Survey, and if there be found any lands bearing coal, the said Secretary is hereby authorized to reserve them from allotment or disposition until further action by Congress: Provided further, That the rights of honorably discharged Union soldiers and sailors of the late Civil and Spanish Wars or Phillipine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act of March first, nineteen hundred and one, shall not be abridged.

Sec. 3. That the price of said lands entered as homesteads under the provisions of this act shall be fixed by appraisement as herein provided. The President of the United States shall appoint two commissions, one for each reservation, each commission to consist of three persons to inspect, appraise, and value all of said lands that shall not have been allotted in

severalty to said Indians, or reserved by the Secretary of the Interior or otherwise disposed of, and excepting sections sixteen and thirty-six in each of said townships, each commission to be constituted as follows: One resident citizen of the States of North and South Dakota, one representative of the Indian Bureau and one person holding tribal relations with one of said tribes of Indians. That within twenty days after their appointment the said commissioners so appointed for each of the said reservations, respectively, shall meet and organize by the election of one of their number as chairman. Each commission is hereby empowered to select such clerks and assistants at such compensation as the Secretary of the Interior may approve. That said commissioners shall then proceed to personally inspect, classify, and appraise, in one hundred and sixty acre tracts each, all of the remaining lands embraced within each reservation as described in section one of this act. In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, grazing land; fourth, timber land; fifth, mineral land, if any, the mineral land not to be appraised. That said commissioners shall be paid a salary of not to exceed ten dollars per day each while actually employed in the inspection and classification of said lands and necessary expenses to be approved by the Secretary of the Interior; such inspection and classification to be completed within six months from the date of the organization of said commissions respectively, and no compensation shall be paid to either the commissioners or employees after the said six months. That when said commissions shall have completed the classification and appraisement of all of said lands the same shall be subject to the approval of the Secretary of the Interior.

Sec. 4. That the price of said lands shall be paid in accordance with the rules and regulations to be prescribed by the Secretary of the Interior upon the following terms: One

fifth of the purchase price to be paid in cash at the time of entry, and the balance in five equal annual installments, to be paid in one, two, three, four, and five years, respectively, from and after the date of entry. In case any entryman fails to make the annual payments, or any of them, when due, all rights in and to the land covered by his entry shall cease, and any payments theretofore made shall be forfeited and the entry canceled, and the lands shall be reoffered for sale and entry under the provisions of the homestead law at the appraised price thereof: And provided, That nothing in this act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed herein, receiving credit for payments previously made. In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law, where the price of land is one dollar and twenty-five cents per acre, and when the entryman shall have complied with all the requirements and terms of the homestead laws as to settlement and residence and shall have made all the required payments aforesaid he shall be entitled to a patent for the lands entered: And provided further, That all lands remaining undisposed of at the expriation of four years from the opening of said lands to entry may, in the discretion of the Secretary of the Interior, be reappraised in the manner provided for in this act. And it is further provided that any lands remaining unsold after said lands have been open to entry for seven years may be sold to the highest bidder for cash without regard to the prescribed price thereof fixed under the provisions of this act, under such rules and regulations as the Secretary of the Interior may prescribe.

Sec. 5. That the Secretary of the Interior is authorized to reserve from said lands such tracts for town-site purposes as in his opinion may be required for the future public interests, and he may cause the same to be surveyed into blocks and lots and

disposed of under such regulations as he may prescribe, in accordance with section twenty-three hundred and eighty-one of the United States Revised Statutes. The net proceeds derived from the sale of such lands shall be credited to the Indians as hereinafter provided.

Sec. 6. That from the proceeds arising from the sale and disposition of the lands aforesaid, exclusive of the customary fees and commissions, there shall be deposited in the Treasury of the United States, to the credit of the Indians belonging and having tribal rights on the reservations aforesaid in the States of South Dakota and North Dakota the sums to which the respective tribes may be entitled, which shall draw interest at three per centum per annum; that the moneys derived from the sale of said lands and deposited in the Treasury of the United States to the credit of said Indians respectively shall be expended for their benefit under the direction of the Secretary of the Interior.

Sec. 7. That sections sixteen and thirty-six of the land in each township within the tract described in section one of this act shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at one dollar and twenty-five cents per acre, and the same are hereby granted to the States of South Dakota and North Dakota for such purpose as the same are located in the said States respectively; and in case any of said sections, or parts thereof, are lost to said States by reason of allotments thereof to any Indian or Indians, or otherwise, the governors of said States, respectively, with the approval of the Secretary of the Interior, are hereby authorized, within the area of the respective States described in section one of this act, to locate other lands not occupied not exceeding two sections in any one township, which shall be paid for by the United States as herein provided, in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement.

Sec. 8. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of

not more than two hundred and twenty-five thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the States of South Dakota and North Dakota, as provided in section seven of this act. And there is hereby appropriated the further sum of seventy-five thousand dollars, or so much thereof as may be necessary, for the purpose of making the appraisement and classification and allotments provided for herein; Provided, That the latter appropriation, or any further appropriation hereafter made for the purpose of carrying out the provisions of this act, shall be reimbursed to the United States from the proceeds received from the sale of the lands described herein or from any money in the Treasury belonging to said Indian tribes respectively.

Sec. 9. That nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of the said lands and to expend and pay over the proceeds received from the sale thereof only as received and as herein provided: Provided, That nothing in this act shall be construed to deprive the said Indians of the Cheyenne River and Standing Rock Indian Reservations, in South Dakota and North Dakota, of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this act: Provided, That Indians residing upon their allotments in townships sixteen north of ranges twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty, and thirty-one east shall have the right to use timber in said townships, except on sections sixteen and thirty-six for domestic purposes only as long as the lands remain part of the public domain.

Approved, May 29, 1908.

APPENDIX "C"

Act of June 1, 1910, 36 Stat. 455

—An Act To authorize the survey and allotment of lands embraced within the limits of the Fort Berthold Indian Reservation, in the State of North Dakota, and the sale and disposition of a portion of the surplus lands after allotment, and making appropriation and provision to carry the same into effect.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed to cause the unsurveyed part of the Fort Berthold Indian Reservation, in the State of North Dakota, to be surveyed, and to sell and dispose of, as hereinafter provided, all the surplus unallotted and unreserved lands within that portion of said reservation lying and being east and north of the Missouri River, and he shall cause an examination to be made of said lands by the Geological Survey; and if there be found any lands bearing coal or other mineral, the Secretary of the Interior is hereby authorized to reserve them from allotment or other disposition until Congress shall provide for their disposal: *Provided,* That any Indians to whom allotments may have been made within the area described herein may, in case they elect to do so before said lands are offered for sale, relinquish the same and select allotments in lieu thereof within the area in which the additional allotments hereinafter provided for are to be made.

Sec. 2. That the Secretary of the Interior be, and he is hereby, authorized to cause an allotment of one hundred and sixty acres of agricultural land or three hundred and twenty acres of grazing land to be made from the lands of the Fort Berthold Indian Reservation to each member of the several tribes belonging to and occupying said reservation now living,

such allotment to be in addition to any allotments heretofore made or which may be made under existing law: *Provided*, That all allotments made under this Act shall be made on that part of the reservation lying west and south of the Missouri River, or in townships one hundred and fifty north, of ranges ninety, ninety-one, ninety-two, and ninety-three west; townships one hundred and forty-nine north, of ranges ninety and ninety-one west; townships one hundred and forty-eight north, of ranges eighty-eight, eighty-nine, ninety, and ninety-one west; and townships one hundred and forty-seven north, of ranges eight-seven, eighty-eight, eighty-nine, and ninety west, lying east and north of the Missouri River: *Provided further*, That all allotments of land in the townships specifically described and lying north and east of the Missouri River shall be made prior to a date to be fixed by the Secretary of the Interior, which date shall be not less than six months from and after the date of approval of this Act.

Sec. 3. That the Secretary of the Interior may reserve such lands as he may deem necessary for agency, school, and religious purposes, to remain reserved as long as needed and as long as agency, school, or religious institutions shall be maintained thereon for the benefit of said Indians; and he is hereby authorized to set aside and reserve such tracts in sections thirty and thirty-one, in township one hundred and forty-seven north, range eighty-seven west, and section thirty-six, in township one hundred and forty-seven north, range eighty-eight west of the fifth principal meridian as he may deem necessary to preserve the ruins of the old Fort Berthold Indian village and the Indian burial grounds adjacent thereto.

Sec. 4. That the Secretary of the Interior is hereby authorized to set aside and reserve such tracts as may be deemed necessary, not to exceed six hundred and forty acres in the aggregate, for the purpose of establishing and maintaining a farm for the benefit of the members of the several tribes of

Indians on the Fort Berthold Indian Reservation; and there is hereby appropriated out of any money in the Treasury to the credit of the said Fort Berthold Indians, or which shall be placed to their credit from the proceeds of the sale of the lands disposed of as provided herein, not otherwise appropriated, the sum of twenty-five thousand dollars, or so much thereof as may be necessary to pay for the construction of the necessary buildings on said lands and for the purchase of necessary live stock, machinery, and equipment, and also to defray the expenses of operating said farm. The management and control of said farm shall be under the supervision of the Commissioner of Indian Affairs

Sec. 5. That the Secretary of the Interior is hereby authorized to set aside and reserve from location, entry, sale, allotment, or other appropriation such tracts as are found to be chiefly valuable for power sites or reservoir sites: *Provided*, That the Secretary of the Interior is hereby authorized to cancel, after notice and a hearing, all trust patents issued to Indian allottees for allotments within any such power or reservoir site: *Provided further*, That the Secretary of the Interior shall report to Congress all lands so withdrawn for power or reservoir sites.

Sec. 6. That before any of the land is disposed of, as hereinafter provided, and before the State of North Dakota shall be permitted to select or locate any lands to which it may be entitled by reason of the loss of sections sixteen and thirty-six, or any portions thereof, by reason of allotment thereof to any Indian or Indians, the Secretary of the Interior is authorized to set aside and reserve from said lands such tracts for town-site purposes as in his opinion may be required for the future public interests, and he may cause the same to be surveyed into lots and blocks and disposed of under such regulations as he may prescribe; and he is hereby authorized to set apart and reserve for school, park, and other public purposes not more than ten acres in any town site; and patents shall be issued for the lands so set apart and reserved for school, park,

and other public purposes, to the municipality legally charged with the care and custody of lands donated for such purposes. The purchase price of all town lots sold in town sites, as hereinafter provided, shall be paid at such time and in such installments as the Secretary of the Interior may direct; and he shall cause not more than twenty per centum of the net proceeds arising from such sales to be set apart and expended under his direction in the construction of schoolhouses or other public buildings or improvements in the town sites in which such lots are located. The net proceeds derived from the sale of such lots, less the amounts expended in the construction of schoolhouses or other public buildings or improvements, as hereinbefore provided, within the town sites aforesaid, shall be credited to the Indians as hereinafter provided.

Sec. 7. That the President of the United States shall appoint a commission, consisting of three persons, to inspect, classify, appraise, and value all of the lands described in section one of this Act that shall not have been allotted in severalty to said Indians or granted or reserved by the terms of this Act, said commission to be constituted as follows: One of the commissioners shall be a person holding tribal relations with said Indians, one a representative of the Interior Department, and one a resident citizen of the State of North Dakota. That within twenty days after their appointment said commissioners shall meet and organize by the election of one of their number as chairman. The said commissioners shall then proceed to personally inspect and classify and appraise, in one hundred and sixty acre tracts, all of the remaining lands described in section one of this Act, except sections sixteen and sections thirty-six. In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, grazing land; fourth, timber land; fifth, mineral land, if any, but the mineral and timber lands shall not be appraised. That said commissioners shall be paid a salary of not to exceed

ten dollars per day each while actually employed in the inspection and classification of said lands and necessary expenses, exclusive of subsistence, to be approved by the Secretary of the Interior; such inspection and classification to be completed within six months from the date of the organization of said commission.

Sec. 8. That when said commissioners shall have completed the classification and appraisement of all of said lands, and the same shall have been approved by the Secretary of the Interior, the lands shall be disposed of under the provisions of the homestead, mineral, and town-site laws of the United States, except as hereinafter otherwise provided and excepting sections sixteen and thirty-six of each township, which sections are hereby granted to the State of North Dakota for school purposes; and in case either of said sections or parts thereof should be lost to the State by reason of the allotment thereof to any Indian or Indians, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, within the area described in section one of this Act, to select other unoccupied, unreserved, nonmineral lands, which selections must be made at least thirty days prior to the date fixed by the President's proclamation opening the surplus lands to settlement: *Provided*, That in any event not more than two sections shall be granted to the State in any one township, and lands must be selected in lieu of sections sixteen and thirty-six, or any part thereof, within the township in which the loss occurs, except in any township where there may not be two sections of unallotted lands, in which event whatever is required to make two sections may be selected in any adjoining township: *Provided further*, That the United States shall pay to the said Indians for the lands in said sections sixteen and thirty-six, so granted, or the lands within said reservation selected in lieu thereof, the sum of two dollars and fifty cents per acre.

Sec. 9. That said lands shall be disposed of by proclamation under the general provisions of the homestead and town-site laws of the United States and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when and the manner in which the lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in said proclamation: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late civil and Spanish wars and Philippine insurrection, as defined and prescribed in sections twetny-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and on shall not be abridged: *Provided further*, That the price of sa agricultural lands shall be the appraised value thereof as approved by the Secretary of the Interior, and the agricultural lands shall be disposed of under the homestead law and shall be paid for in accordance with the rules and regulations to be prescribed by the Secretary of the Interior upon the following terms: One-fifth of the purchase price to be paid in cash at the time of entry and the balance in five equal installments, to be paid in two, three, four, five, and six years, respectively, from and after the date of entry. In case any entryman fails to make the annual payments, or any of them, when due, all rights in and to the land covered by his entry shall cease, and any payments theretofore made shall be forfeited and the entry canceled, and the lands shall be again subject to entry under the provisions of the homestead law at the appraised price thereof: *Provided*, That nothing in this Act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the appraised price, receiving credit for payments previously made. In addition to the price to be paid for the land, the entryman shall pay the same fees and

commissions at the time of commutation or final entry as now provided by law where the price of land is one dollar and twenty- five cents per acre, and when the entryman shall have complied with all the requirements and terms of the homestead laws as to settlement and residence and shall have made all the required payments aforesaid he shall be entitled to a patent for the lands entered: *And provided further*, That all lands remaining undisposed of at the expiration of four years from the opening of said lands to entry may, in the discretion of the Secretary of the Interior, be reappraised in the manner provided for in this Act.

Sec. 10. That the Secretary of the Interior is hereby authorized to set aside and reserve as a tribal forest reserve all timber lands, to be used by said Indians under the direction of the Commissioner of Indian affairs.

Sec. 11. That the net proceeds derived from the sale of said lands in conformity with this Act shall be paid into the Treasury of the United States to the credit of the Indians belonging to and having tribal rights on said reservation, which shall draw interest at the rate of three per centum per annum; that all the moneys derived from the sale of said lands and deposited in the Treasury of the United States to the credit of said Indians shall be subject to appropriation by Congress for their education, support, and civilization.

Sec. 12. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of one-hundred thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the State of North Dakota, and there is hereby appropriated the further sum of one hundred thousand dollars, or so much thereof as may be necessary, for the purpose of making surveys, appraisements, allotments, and classification provided for herein: *Provided*, That the latter appropriation, or any further appropriations hereafter made for the purpose of carrying out the provisions of

APPENDIX "D"

this Act, shall be reimbursed to the United States from the proceeds received from the sale of the lands described herein or from any money in the Treasury belonging to said Indian tribes.

Sec. 13. That the lands allotted, those retained or reserved, and the surplus lands sold, set aside for town-site purposes, granted to the State, or otherwise disposed of shall be subject to all laws of the United States prohibiting the introduction of intoxicants into the Indian country until Congress shall otherwise provide.

Sec. 14. That nothing in this Act contained shall in any manner bind the United States to purchase any of the land herein described, except sections sixteen and thirty-six, or the equivalent in each township, or to dispose of said lands except as provided herein, or to guarantee to fine purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received and as herein provided: *Provided*, That nothing in this Act shall be construed to deprive said Indians of Fort Berthold Indian Reservation of any benefits to which they are entitled under existing treaties or agreement not inconsistent with the provisions of this Act.

Approved, June 1, 1910.

NO. 82-1253

IN THE

Supreme Court of the United States

October Term, 1983

HERMAN SOLEM, *et al.*,
Petitioners,

v.

JOHN BARTLETT,
Respondent.

On Writ of Certiorari to
The United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE COUNTIES OF DUCHESNE AND UINTAH, UTAH; COUNTIES OF MOUNTRAIL, WARD, AND MCLEAN, NORTH DAKOTA; LAKE COUNTY, MONTANA; MAHNOMEN COUNTY, MINNESOTA; AND THE TOWNS OF HOBART AND ONEIDA, WISCONSIN, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI

Commencing in the early 1970's, judicial decisions in favor of Indian tribes have resurrected the reservation status of a number of areas which were originally Indian reservations but which were thought to have been disestablished by congressional enactment long ago. Despite the several decisions of this Court which were intended to clarify the matter, confusion in this area of the law persists, and the lower courts continue to find that historic reservation areas still exist despite persuasive evidence to the contrary. The Counties and Towns joining in this brief all contain areas that were at one time established as Indian reservations. The question of whether these historic reservations continue to exist today is of considerable importance to the Amici, since reservation status significantly affects the extent to which a state and its local subdivisions may exercise governmental

authority within those areas. See, e.g., DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975). Thus, the principles and guidelines used by the courts, particularly this Court, are of paramount concern to the Amici Towns and Counties. The specific concerns and interests of the various Amici are separately discussed below.

The Utah Counties:

The Counties of Duchesne and Uintah are presently involved in litigation over the two historic Indian reservation areas located within their boundaries. Ute Indian Tribe v. State of Utah, 521 F. Supp. 1072 (D. Utah 1981), appeals pending, Nos. 81-1827 & 81-1901 (10th Cir.). They are: the original Uintah Indian Reservation established by Executive Order of October 3, 1861 (I Kappler 900) and the Act of May 5, 1864 (13 Stat. 63); and, the original Uncompahgre Indian Reservation established by Executive Order of January 5, 1882 (I Kappler 901). Both these historic

reservations were allotted and opened to entry pursuant to surplus land acts enacted in the late 1800's or early 1900's. By Presidential Proclamation of July 14, 1905 (34 Stat. 3119), it was proclaimed that, pursuant to the surplus land act of May 27, 1902 (32 Stat. 245, 263) and amendments thereto, the unallotted and unreserved lands of the historic Uintah Reservation were to be opened for public entry and settlement. See, e.g., Uintah and White River Bands of Ute Indians v. United States, 139 Ct. Cl. 1, 22 (1957). And, pursuant to the Act of June 7, 1897 (30 Stat. 62, 87), the unallotted lands of the Uncompahgre Reservation were opened to public entry. See, e.g., [1911] Report of the Commissioner of Indian Affairs at 92. Subsequent to the opening of these reservation areas, only the lands which were reserved from the opening for the Ute Tribe, along with the lands subsequently restored to tribal ownership and reservation status (see 10 Fed. Reg. 12409;

62 Stat. 72), were, until recent years, treated as that Tribe's existing reservation.

The boundary dispute involving the two historic Ute reservations is similar, in several crucial respects, to the case before this Court: restoration to public domain language plays a prominent role in each case; and, important aspects of the subsequent administrative and legislative treatment of the two historic reservations substantially parallel those of the opened area at issue here. As a result, the resolution of this case is particularly important for Duchesne and Uintah Counties because the Court may well address matters which could have a direct and significant impact upon their boundary dispute.

The North Dakota Counties:

Within the Counties of Mountrail, Ward, and McLean is located the original Fort Berthold Indian Reservation as established by the Act of March 3, 1891 (26 Stat. 1032). The status of this historic reservation was

the subject of the decision in City of New Town, North Dakota v. United States, 454 F.2d 121 (8th Cir. 1972) -- a decision which antedates both DeCoteau v. District County Court, 420 U.S. 425 (1975) and Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977). In 1979, the Eighth Circuit expressly "adhere[d]" to its opinion in New Town without conducting an independent reexamination of the surplus land act involved in that decision. See United States v. Dupris, 612 F.2d 319, 323 (8th Cir. 1979), vacated mem. 446 U.S. 980 (1980).

Pursuant to the Act of June 1, 1910 (36 Stat. 455), the unallotted and unreserved lands of the original Fort Berthold Reservation lying east and north of the Missouri River (which roughly traverses the reservation diagonally from northwest to southeast) were opened to public entry. See 37 Stat. 1693; 39 Stat. 1748. Thereafter, until the early 1970's, the opened lands were

understood and treated as having been disestablished. See New Town, 454 F.2d at 123. The 1910 surplus land act is very much like the act at issue in this case. In particular, like the 1908 Cheyenne River Act, it has: (1) a "sell and dispose" provision (§ 1, 36 Stat., at 455); (2) a school lands provision (§ 8, 36 Stat., at 457); and (3) a prohibition against the introduction of intoxicants provision (§ 13, 36 Stat., at 458). In addition, several important aspects of the subsequent administrative and legislative treatment of the opened portion of the original Fort Berthold Reservation substantially parallel those present in the instant case. Hence, the resolution of this case will likely have an important bearing on any future litigation which might arise in regard to the reservation status of the opened portion of the original Fort Berthold Reservation.

The Montana County:

A substantial portion of Lake County, Montana, is included within the original Flathead Indian Reservation as established by treaty in 1855 (12 Stat. 975). The status of this historic reservation was the subject of the decision in Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir.), cert. denied sub nom. City of Polson, Montana v. Confederated Salish and Kootenai Tribes, ____ U.S. ____, 103 S. Ct. 314 (1982). Pursuant to the Act of April 23, 1904 (33 Stat. 302), as amended, the unallotted and unreserved lands of the original Flathead Reservation were opened for entry and settlement in 1910. See 36 Stat. 2494. thereafter, the State and local governments exercised unquestioned jurisdiction over the opened and unrestored portions of that area

for some forty years.[1] See, e.g., Pet. for Writ of Cert. at 20-21, 28, City of Polson, Montana v. Confederated Salish and Kootenai Tribes, Sup. Ct. No. 81-2406. The 1904 Flathead Act, as amended, is identical to the 1908 Cheyenne River Act in two crucial respects. It has both a school lands provision (§ 8, 33 Stat., at 303-04) and a prohibition against the introduction of intoxicants provision which was added by subsequent amendment in 1909 (§ 21, 35 Stat. 781, 795-96). Moreover, there are important similarities between the subsequent administrative and legislative treatment of the original Flathead Reservation and that present in the instant case. See, e.g., Pet. for Writ of Cert., supra, at 21-22, 28-30. Obviously then,

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1. Under Public Law 280, the State of Montana assumed full criminal jurisdiction and some civil jurisdiction over all Indian country within the original Flathead Reservation in 1965. See, e.g., Pet. for Writ of Cert. at 6 n.2, City of Polson, Montana v. Confederated Salish and Kootenai Tribes, Sup. Ct. No. 81-2406.

Lake County is joining herein because the resolution of this case could have a significant effect on any future litigation which implicates the reservation status of the opened portion of the original Flathead Reservation.

The Minnesota County:

Mahnomen County is located within the original White Earth Reservation as established by the Treaty of March 19, 1867 (16 Stat. 719). The status of this historic reservation was the subject of the decisions in White Earth Band of Chippewa Indians v. Alexander, 683 F.2d 1129 (8th Cir.), cert. denied, ____ U.S. ____, 103 S.Ct. 489 (1982), and State v. Clark, 282 N.W.2d 902 (Minn. 1979), cert. denied, 445 U.S. 904 (1980). In 1889, title to those lands of the original White Earth Reservation not necessary for allotments was ceded by the White Earth Indians to the United States under the Act of January 14, 1889 (25 Stat. 642); most all of the

remainder of the Reservation was subsequently allotted under § 3 of the Act. See, e.g., H.R. Exec. Doc. No. 247, 51st Cong., 1st Sess. 34-37 (1890); Department of the Interior - Office of Indian Affairs, General Data Concerning Indian Reservations 6 (1929). After formal approval of the cession agreement in 1890 (see H.R. Exec. Doc. No. 247, at 1-2), the State had, until recent years, continuously exercised full governmental authority within the original reservation, except on tribal and allotted trust lands.[2]

In State v. Clark, it was held that the original White Earth Reservation was not

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2. Under Public Law 280, the State of Minnesota was given civil and criminal jurisdiction over all Indian country within the State except within the present Red Lake Reservation. See, e.g., 18 U.S.C. § 1162; 28 U.S.C. § 1360.

disestablished by the 1889 surplus land act.[3] In so holding, the Minnesota Supreme Court relied heavily on a U.S. District Court decision antedating Rosebud and DeCoteau -- Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001 (D. Minn. 1971). Thus, the Amici Counties' primary concern is the significance of DeCoteau and Rosebud in relation to the continued viability of earlier boundary decisions -- a problem which is presented here as the decision under review is ultimately based upon a pre-DeCoteau and Rosebud decision. See discussion, infra at Sec. IA. Hence, Mahnomen County is joining in this brief in order to ensure that the role they believe Rosebud and DeCoteau play in this regard is fully presented to the Court.

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3. In White Earth Band of Chippewa Indians v. Alexander, Mahnomen and the other affected counties were found to be collaterally estopped from relitigating the disestablishment issue decided in Clark. White Earth Band, 683 F.2d at 1133-35.

The Wisconsin Towns:

Lastly, the Towns of Hobart and Oneida, Wisconsin, have a general interest in cases of this type. Like a great many local governments in the West and Midwest, the Towns administer areas which were at one time Indian reservations but whose lands lost their tribal character as a result of federal actions taken pursuant to the allotment policy of the late nineteenth and early twentieth centuries. Both Towns are located within the original Oneida Indian Reservation as established by Treaty of February 3, 1838 (7 Stat. 566). During the late 1800's and early 1900's, virtually all of the lands of that historic reservation were allotted and patented in fee simple under the 1887 General Allotment Act (24 Stat. 388) and the Act of June 23, 1906 (34 Stat. 325, 280-81). After that, the original reservation had been regarded by all concerned as having been disestablished, and the State and local governments have exercised

full governmental authority within that area, except on tribal trust and allotted lands. Recently, however, the suggestion has been made, based on dicta in the judicial decisions of recent years, that the historic Oneida Reservation still exists and consequently, the Towns' jurisdiction is limited.[4]

The Towns are most concerned with the alarming trend in recent decisions to ignore the federal policies which prevailed during the period in question (viz., assimilation of the Indian population and reduction of the existing reservation areas), and to resurrect the boundaries of Indian reservation areas thought to have been disestablished long ago. They therefore join in this brief in order to insure that the historical perspective is fully presented and to urge that the Court

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4. Under Public Law 280, the State of Wisconsin was granted civil and criminal jurisdiction over all Indian country within its borders. See 18 U.S.C. § 1162; 28 U.S.C. § 1360.

avoid any dicta which may encourage lower courts to find that historic Indian reservation areas still exist in the face of historical evidence to the contrary.

SUMMARY OF ARGUMENT

The Amici do not intend to track all aspects of the disestablishment case presented here. The briefs of the Petitioners and the Amici Counties of Dewey, South Dakota et al., fairly address the merits of the case in its entirety, and the Amici fully concur in the views expressed therein. The Amici are writing separately here for the purpose of highlighting those aspects of this case similar or identical to their situation which merit especial treatment. Specifically, discussion will be had as to the importance of Rosebud and DeCoteau in this context generally, and the significance which should be attributed the following matters in the disestablishment analysis: the prevailing federal policies of the era; the presence of

public domain language; certain crucial aspects of the subsequent administrative and legislative treatment including restoration of opened but undisposed of lands to tribal ownership and reservation status under the 1934 Indian Reorganization Act (48 Stat. 984); and continued federal presence in the opened area in question. The Amici believe that the role these matters play were not fully explored in the disestablishment cases previously presented to this Court or in the other briefs submitted in this case. We, of course, recognize that under the prevailing analysis, each case must be decided on its facts. See, e.g., Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District County Court, 420 U.S. 425 (1975). Nevertheless, it is important to develop the common threads between the numerous surplus land acts enacted in the late 1800's and early 1900's (see National Indian Law Library, Compilation of Allotment/Cession Statutes, Cat. No. 002279),

in order to enable the Court to make an informed decision, and, at the same time, provide useful guidance for similar cases which may arise in the future.

ARGUMENT

I. THE PURPOSE UNDERLYING THE 1908 SURPLUS LAND ACT AT ISSUE WAS UNQUESTIONABLY THAT OF DISESTABLISHMENT

The Amici agree with the Petitioners that the underlying purpose of the Act of May 29, 1908, 35 Stat. 460, was to disestablish those portions of the Cheyenne River Reservation (and, by necessary implication, the Standing Rock Reservation) opened to entry and settlement under that Act. The principles which govern the analysis in this context are well established (see, e.g., Rosebud, 430 U.S. at 586-87; DeCoteau, 420 U.S. at 444); and, therefore, need not be repeated here. Suffice it to say that the focal point of inquiry is, as in any case involving the interpretation of federal legislation, congressional intent.

See Rosebud Sioux Tribe v. Kneip at 586; DeCoteau v. District County Court at 444.

A. Rosebud and DeCoteau Represent a Significant Departure from the Court's Previous Decisions in the Disestablishment Context.

Although several other cases are cited, it is fair to say that the decision of the lower court ultimately rests upon United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973), as that is the only case in which the effect of the 1908 Act at issue was independently examined. See 691 F.2d 420 at 421. As that case predates Rosebud and DeCoteau, and relies upon narrow and outdated principles, the Amici believe that Erickson cannot be considered persuasive precedent. Because of the importance DeCoteau and Rosebud play here, it would be worthwhile to examine the evolution of the Court's decisions in this context.

The Court's treatment of the disestablishment question in recent years begins with Seymour v. Superintendent, 368 U.S. 351

(1962). At issue in that case was a 1906 Act which opened up the surplus lands of the southern part of the Colville Indian Reservation for entry and settlement. The Court held that since express language of termination was not used, that Act was not intended by Congress to disestablish the area affected:

> Nowhere in the 1906 Act is there to be found any language similar to that in the 1892 Act [which terminated the northern half of the Reservation] expressly vacating the South Half of the reservation and restoring that land to the public domain. Quite the contrary, the 1906 Act repeatedly refers to the Colville Reservation in a manner that makes it clear that the intention of Congress was that the reservation should continue to exist as such. . . .

Seymour v. Superintendent, at 355. And, when the Court next considered the disestablishment question some ten years later in Mattz v. Arnett, 412 U.S. 481 (1973), the absence of express language of termination once again featured prominently as the following passage from that case illustrates:

> More significantly, throughout the period from 1871-1892 numerous bills were introduced which expressly provided for the termination of the reservation and did so in unequivocal terms. Congress was fully aware of the means by which termination could be effected. But clear termination language was not employed in the 1892 Act [which opened up the surplus lands of the Klamath Reservation for settlement]. This being so, we are not inclined to infer an intent to terminate the reservation. . . .

Mattz v. Arnett, at 504 (emphasis in original). Thus, after Seymour and Mattz, the absence of presence of express language of termination was generally viewed as crucial to the disposition of a reservation boundary dispute. See, e.g., United States ex rel. Feather v. Erickson, 489 F.2d 99, 102 (8th Cir. 1973). And what was apparently critical to this approach was the Court's perception of the prevailing policies of the era:

> The meaning of those terms [the terms of the 1892 Act] is to be ascertained from the overview of the earlier General Allotment Act of 1887, 24 Stat. 388. That Act permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. Its policy was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservations could be abolished. Unallotted lands were made available to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways.

Mattz v. Arnett, at 496 (footnote omitted).

Since Seymour and Mattz, this Court has twice more considered the effect of various surplus land acts, first in DeCoteau v. District County Court, 420 U.S. 425 (1975), and then in Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977). The Amici believe that these two decisions represent a significant departure from the approach taken in the earlier cases. This is evident not only from the dissents entered in both cases but from a

footnote in a later decision, Puyallup Tribe, Inc. v. Department of Game of Washington, 433 U.S. 165 (1977). First, the dissenters in DeCoteau emphasized that "clear language to express termination" was not employed in the surplus land act at issue in that case. Id., 420 U.S. at 463, 466. The same argument was also pressed by the dissenters in Rosebud. Id., 430 U.S. at 618-20. Second, in Puyallup Tribe, Inc. -- a case decided shortly after Rosebud -- the Court made evident the importance it attached to the principles set forth in DeCoteau and Rosebud when it stated:

> The continued existence of the Puyallup Reservation has been a matter of dispute on which we express no opinion. The Ninth Circuit, relying on our decision in Mattz v. Arnett, 412 U.S. 481, held that the reservation did still exist, United States v. Washington, 496 F.2d 620 (1974), cert. denied, 419 U.S. 32. That decision predates our consideration of DeCoteau v. District County Court, 420 U.S. 425, and Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).

Id., 433 U.S. at 173 n.11.[5] Apparently then, the Court itself acknowledged that Rosebud and DeCoteau are considerably more expansive than the previous decisions in this context.

In Rosebud and DeCoteau, it was made clear that the focus of inquiry is on the intent of Congress, which can be variously expressed; hence, the face of the act at issue, its legislative history and surrounding

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5. The significance of footnote 11 is reinforced by the following excerpt from the dissent in that case:

> The Court tries to avoid the force of this analysis by denigrating the holding of the Court of Appeals for the Ninth Circuit. The Court states: [footnote 11 is quoted in part here]. This, to say the least, is a casual disregard of settled principles of res judicata and collateral estoppel. . . . The Court of Appeals squarely held, contrary to the contention of the State of Washington, that the [Puyallup] reservation continued to exist. . . . It is inappropriate now for the Court to denigrate the impact of that holding. . . .

Puyallup Tribe, Inc., 433 U.S. at 183 (Brennan, J., dissenting) (emphasis supplied).

circumstances must all be examined. Rosebud Sioux Tribe v. Kneip, 430 U.S. at 586-87; DeCoteau v. District County Court, 420 U.S. at 444. At the same time, the Court indicated that the use of express language is not the only method by which congressional action can result in disestablishment. Rosebud Sioux Tribe v. Kneip at 588 n.4. This expanded analysis reflects a refinement in the Court's perception of the National policies of the era involved. See Rosebud Sioux Tribe v. Kneip at 590; DeCoteau v. District County Court at 431-33. See also Montana v. United States, 450 U.S. 544, 559 n.9 (1981). As pointed out in DeCoteau:

> In 1887, the General Allotment Act (or Dawes Act) was enacted in an attempt to reconcile the Government's responsibility for the Indians' welfare with the desire of non-Indians to settle upon reservation lands. The Act empowered the President to allot portions of reservation land to tribal members and, with tribal consent, to sell the surplus lands to white settlers, with the proceeds of these sales being dedicated to the Indians' benefit.

> Against this background, a series of negotiations took place in 1889 with the objective of opening the Lake Traverse Reservation to settlement. . . .

Id., 420 U.S. at 432-33 (citation and footnotes omitted).[6] What is particularly significant

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6. That the Court had refined its perspective of the General Allotment Act in DeCoteau and Rosebud is evident from the dissenting opinion filed in the latter case. There, it was pointed out that

> [t]he Court's construction of the Rosebud Acts is also untenable when the Acts are placed in historical context. Just as we held in Mattz that the statute at issue there was to be interpreted "from the overview of the earlier General Allotment Act of 1887, 24 Stat. 388," 412 U.S. at 496, so, too, must the Rosebud Acts be construed from this perspective. As we observed in Mattz:
>
> "[The policy of the General Allotment Act] was to continue the reservation system. . . ." . . . This policy reflected Congress' attempt "to reconcile the Government's responsibility for the Indians' welfare with the desire of non-Indians to settle upon reservation lands." DeCoteau v. District County Court, 420 U.S. at 432. Because the "familiar forces," id. at 431, at work on Congress demanded land for settlers, Congress opened the reservations. But because these forces were not overly concerned

here is that in neither DeCoteau nor Rosebud was there mention of the viewpoint espoused in Mattz that the policy of the General Allotment Act was "to continue the reservation system."[7] Indeed, the Court has since

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(cont.)

with the niceties of reservation boundaries, the reservation status of the opened areas was preserved until the trust period expired, to insure federal protection of the Indians while they were being "civilized" through contacts with white settlers. Thus, to interpret the Rosebud Acts as terminating three-fourths of the Rosebud Reservation is to set them at war with Congress' general policy towards Indians at the time the Acts were approved.

Id., 430 U.S. at 624-25.

7. While the Amici acknowledge that this aspect of Mattz was quoted favorably in Moe v. Confederated Salish & Kootenai Tribes of the Flathead Indian Reservation, 425 U.S. 463, 478-79 (1976), it is significant that it was done in reference to § 6 of the General Allotment Act and not § 5, the surplus lands provision of that Act. (Section 6 essentially dealt with the trust period to be established for allotments and when the patentee was to be subject to state law.) The result is that, under § 6, allotted reservations temporarily continued in reservation status. Nevertheless, the ultimate aim of the Act was the "'gradual extinction of Indian

expressly acknowledged that "[t]he policy of the [1887 Act] was the eventual assimilation of the Indian population. . . , and 'the gradual extinction of Indian reservations and Indian titles.' . . ." Montana v. United States, 450 U.S. 544, 559 n.9 (1981) (citation omitted). See also United States v. Southern Pacific Transportation Co., 543 F.2d 676, 695 (9th Cir. 1976) ("ultimate aim of the general policy of allotment was the abolition of Indian reservations. . . .")

To summarize, in DeCoteau and Rosebud, the Court adopted an approach somewhat different and more expansive than that which was used in previous decisions. It would appear then, that to the extent that the earlier cases are not in harmony with either Rosebud or DeCoteau, they should no longer be

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(cont.)
reservations.' . . ." Montana v. United States, 450 U.S. 544, 559 n.9 (1981), quoting Draper v. United States, 164 U.S. 240, 246 (1896).

considered useful precedent.[8] But see Lower Brule Sioux Tribe v. State of South Dakota, slip op. at 17-18; Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d at 956 n.11; Ute Indian Tribe v. State of Utah, 521 F. Supp. at 1135. So too, adherence to a court decision predating Rosebud and DeCoteau is inappropriate, where, as in this case, the surplus land act at issue is not thoroughly

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8. Conversely, the lower courts are not free to disregard the guidelines established by Rosebud and DeCoteau as the Eighth Circuit recently did in Lower Brule Sioux Tribe v. State of South Dakota, ____ F.2d ____ (8th Cir., June 27, 1983). In that case, the court stated, in obvious disregard of the approach espoused in both Rosebud at 586 and DeCoteau at 444, as follows:

> Because a clear congressional intent to disestablish cannot be found on the face of the [act at issue], the necessary intent can be found only if there is operative statutory language that is "precisely suited" to the purpose of disestablishment and this purpose is confirmed by the Act's legislative history and surrounding circumstances. . . .

Slip op. at 11, Appeal Nos. 82-1635 & 82-1636 (emphasis supplied).

analyzed anew. This is not to suggest that all cases antedating Rosebud and DeCoteau are incorrect -- they may not be. However, because those two cases have significantly changed the approach to be taken in this context, the lower courts are obligated to engage in a thorough and detailed reexamination of the subject act, following the guidelines and principles set forth in Rosebud and DeCoteau, in order to determine whether the earlier decision was, in fact, correct. See also Appawora v. Brough, 431 U.S. 901 (1977) (disestablishment case remanded for further consideration in light of Rosebud). This the lower court did not do as it rigidly adhered to the Erickson decision.

B. The Prevailing Federal Policy.

When assessing any legislation, the policies prevailing at the time of enactment can be an important consideration. As this Court has previously recognized in the Indian context, the treaties and statutes affecting Indians "cannot be interpreted in isolation

but must be read in light of the common notions of the day and the assumptions of those who drafted them. . . ." Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978) (emphasis supplied). Accord Wilson v. Omaha Indian Tribe, 442 U.S. 653, 666 (1979). Moreover, because the "surrounding circumstances" are to be examined whenever the disestablishment effect of a surplus land act is at issue (see, e.g., Rosebud, 430 U.S. at 587; DeCoteau, 420 U.S. at 444), the historical context in which that act was passed must obviously be considered.[9]

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9. Several courts have expressly refused to attribute any particular significance to the prevailing policies largely because of the differing results which have obtained in this context. See, e.g., Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d at 957-58; Ute Indian Tribe v. State of Utah, 521 F. Supp. at 1150-52. While there is certainly no question that the cases regarding the disestablishment effect of surplus land acts have gone both ways, this fact should not in any way affect the role the prevailing policies ought to play here. The Amici do not claim that these policies

The prevailing federal Indian policy in the late 1880's and early 1900's was essentially twofold: assimilation of the Indian population and the reduction of existing Indian reservations. As delineated in the contemporaneous Reports of the Secretary of the Interior and the Commissioner of Indian Affairs, the policy of the federal government at that time was civilization of the Indian population, which was to be accomplished primarily by education, allotment of lands in severalty, and destruction of tribal relations. See, e.g., [1885] Report of the Secretary of the Interior at 25-28; [1886] Report of the Secretary of the Interior at 4; [1888] Report of the

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(cont.)
alone are dispositive of the issue presented. Instead, the purpose of this discussion is simply to establish the historical setting in which these various acts were passed -- a matter which, as discussed earlier, should have a bearing in interpreting the 1908 surplus land act at issue. See also Montana v. United States, 450 U.S. at 559 nn.8 and 9.

Secretary of the Interior at XXIX-XXXII; [1889] Report of the Commissioner of Indian Affairs at 3-4; [1890] Report of the Commissioner of Indian Affairs at VI, XXXIX; [1891] Report of the Commissioner of Indian Affairs at 3-9, 26; [1892] Report of the Commissioner of Indian Affairs at 5; [1894] Report of the Secretary of the Interior at IV. See generally Montana v. United States, 450 U.S. at 559-60 n.9. At the same time, it was the unquestioned policy of the federal government to reduce the existing Indian reservations in order to make the surplus lands -- that is, the lands not needed by the Indians themselves -- available for non-Indian settlement.[10] See, e.g., XVII Cong. Rec. 2271 (remarks of Rep. Perkins), 2306 (remarks of

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10. Thus, as stated in H.R. Rep. No. 791, 50th Cong., 1st Sess. (1888), "[t]he policy of the Government from its earliest days has been to restore Indian reservations or portions thereof to the public domain as the exigencies of advancing population required it. . . ." Id. at 3.

Rep. Weaver), 2310 (remarks of Rep. Cutcheon) (1886); H.R. Rep. No. 791, 50th Cong., 1st Sess. 3 (1888); XXVI Cong. Rec. 6236 (remarks of Rep. Coffen), 7689 (excerpts from Report on North American Indians) (1894). The contemporaneous Reports of the Secretary of the Interior and the Commissioner of Indian Affairs are replete with references to this policy.[11] See, e.g., [1885] Report of the Secretary of the Interior at 25-26; [1888] Report of the Secretary of the Interior at XXXIV; [1889] Report of the Commissioner of Indian Affairs at 3-4 and 112; [1890] Report of the Secretary of the Interior at XXIII-XXIV; [1890] Report of the Commissioner of Indian Affairs at VI and XXXVIII-XXXIX; [1891] Report of the Commissioner of Indian Affairs at 8 and 44-47; [1892] Report of the Secretary

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11. It is significant that in a recent Opinion of the Solicitor, 84 I.D. 1 (1977), it was recognized that the prevailing federal policy at this time was, in part, "to reduce the size of Indian reservations. . . ." Id., 84 I.D. at 9.

of the Interior at VII-VIII and XXXIII; [1892] Report of the Commissioner of Indian Affairs at 5 and 74. The following excerpt from the 1891 Report of the Commissioner succinctly sets forth the underlying basis for pursuing a policy of reducing the existing reservations:

> While perhaps it is possible to push such work too rapidly, I do not hesitate to say that the ultimate destruction of the entire system of reservations is inevitable. There is no place for it in our present condition of life, and it must go. The millions of acres of Indian land now lying absolutely unused are needed as homes for our rapidly increasing population and must be so utilized. Whatever right and title the Indians have in them is subject to and must yield to the demands of civilization. They should be protected in the permanent possession of all this land necessary for their own support, and whatever is taken from them should be paid for at its full market value. But it cannot be expected under any circumstances that these reservations can remain intact, hindering the progress of civilization. . . . The Indians themselves are not slow to appreciate the force of the logic of events, and are becoming more and more ready to listen to propositions for the reduction of the

reservations and the extinguishment of their title to such portions of the land as are not required for their own use.

Id. at 46 (emphasis supplied).[12]

Firmly entrenched as national policy by

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12. Earlier in the same Report, the Commissioner advocated that this policy be carried out with dispatch:

> Now that there is coming to be a pretty well recognized and rational policy, it should be carried into execution with as much vigor as is practicable, to the end that the results anticipated from it may be reached as speedily as possible.
>
> If the policy of allotting lands is conceded to be wise, then it should be applied at an early day to all alike wherever the circumstances will warrant. If we have settled upon the breaking up of tribal relations, the extinguishment of the Indian titles to surplus lands, and the restoration of the unneeded surplus to the public domain, let it be done thoroughly. If reservations have proven to be inadequate for the purposes for which they were designed, have shown themselves a hindrance to the progress of the Indian as well as an obstruction to the pathway of civilization, let the reservations, as speedily as wisdom dictates, be utterly destroyed and entirely swept away.

Id. at 8 (emphasis supplied).

the early 1900's, these policies remained in effect through much of the first two decades of the 1900's. See, e.g., [1906] Report of the Commissioner of Indian Affairs at 81-82 wherein the Commissioner stated:

> I am convinced that a wise provision in any general allotment act would be to allow not less than 5 or more than 40 acres of irrigable land, or not more than 640 acres of grazing land, to each Indian, in the discretion of the Secretary of the Interior. This would better meet existing conditions and enable the Department to care properly for the interests of all concerned. Another result which could hardly help flowing from it would be the more rapid opening of reservations and the consequent dissolution of the generally condemned reservation system; for the executive branch of the Government could act then in one case after another without the need of consuming the time of the Congress upon special legislation. The development of what has been known as the frontier West would thus proceed along the line of least resistance, for the ultimate advantage of our whole country.

Id. (emphasis supplied). As pointed out in an earlier boundary decision of the Eighth Circuit, Rosebud Sioux Tribe v. Kneip, 521

F.2d 87 (8th Cir. 1975), aff'd, 430 U.S. 584 (1977), in this regard:

> The land was being thrown open for farming. The settlers were emigrating in great numbers to the new land in the West, buying their farms and planting their crops. The Indian reservations were being eroded, not preserved. . . .

Id. at 102 (emphasis supplied). Accord Hollister v. United States, 145 F. 773, 777 (8th Cir. 1906) ("tribal reservations under the act of 1887 were fast being disintegrated. . . .")

Since the prevailing national policy was, in part, to reduce the existing Indian reservations, it becomes apparent that the surplus land provisions of the 1887 General Allotment Act (24 Stat. 388)[13] -- the seminal legislation of this era (see Montana v. United

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13. Section 1 of the General Allotment Act guaranteed that individual members of the Tribe would receive a prescribed amount of reservation land in the form of allotments, while Section 5 of that Act made provision for the eventual disposal of the unallotted or "surplus" lands of the then existing reservations.

States, 450 U.S. at 559 n.8; n.14 infra) -- were not, as apparently suggested in Mattz, 412 U.S. at 496, intended by Congress to continue the reservation system. On the contrary, it would appear that the Act was passed to reconcile the dual policies of civilization and reduction of existing reservations.[14] See, e.g., United States v.

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14. Thus, in a letter to Congress dated March 10, 1892 reproduced in S. Rep. No. 57, 53d Cong., 1st Sess. at 2-5 (1893), the Commissioner of Indian Affairs stated as follows:

> The policy of the Government, rendered fixed and definite by the passage of the severalty law in 1887, had for its object the twofold purpose of allotting lands in severalty, with the view of stimulating the individuality of the Indians and promoting their personal prosperity, and also of rendering available for white settlement vast areas of surplus lands not needed by the Indians. Indian lands restored to the public domain and thrown open to white settlement under the homestead law become taxable on the completion of the title. . . .

S. Rep. No. 57, at 3. To this end, it was thought by advocates of the prevailing policy that the enactment of surplus land statutes would be beneficial to both the

Southern Pacific Transportation Co., 543 F.2d 676, 694-95 (9th Cir. 1976); Hollister v. United States, 145 F. at 776-77. See also DeCoteau v. District County Court, 420 U.S. at 432.

(cont.)
individual allottees of the reservations affected and the United States: first, the land would be settled by non-Indians who would expose the allottees to the ways of civilization, thereby facilitating the policy of assimilation; second, it was thought that the sale of surplus land would serve as a means of support for the allottees until they were fully capable of assuming the responsibilities of citizenship; and third, vast tracts of land could, at the same time, be made available for settlement to meet the demands of the Nation's westward expansion. See, e.g., H.R. Rep. No. 791, 50th Cong., 1st Sess. at 3 (1888); [1890] Report of the Commissioner of Indian Affairs at XXXVII-XL; [1891] Report of the Secretary of the Interior at VI; [1892] Report of the Secretary of the Interior at VII and XXXIII. And, as intended, with the passage of the General Allotment Act, the opening of reservation lands occurred at a much more rapid pace than previously. See, e.g., [1891] Report of the Secretary of the Interior at VI; [1892] Report of the Secretary of the Interior at VII and XXXIII.

In summary, the enactment of surplus land legislation in the late 1800's and early 1900's was part and parcel of the prevailing federal policy of reducing existing Indian reservations. It follows then, that the commonly held assumption at this time must have been that with the opening of these areas to entry and settlement, the reservation status of the lands involved was to end. See, e.g., Hollister v. United States, 145 F. at 777. And, as Oliphant, 435 U.S. at 206, establishes, these are the policies and assumptions which should inform the Court's decision here.

C. The Significance of Public Domain Language

Because the 1908 Act at issue employs public domain language (§ 9, 35 Stat., at

464),[15] its significance bears amplification here. This is of particular concern to the Utah Counties as there is a dispute in their boundary case over whether such language has any significance in this context at all. See, e.g., Reply Brief of the Ute Tribe at 8-21, 26-27, Ute Indian Tribe v. State of Utah, et al., Appeal Nos. 81-1827 and 81-1901 (10th Cir.). A review of the applicable authorities shows that the use of such language, particularly by Congress, is an important -- if not controlling -- factor in the disestablishment analysis.

The courts have, in cases involving reservation boundary disputes, consistently

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15. Section 9 provided that that Indians residing in certain townships in the opened portion of the reservation retained a right to take timber in those townships for domestic purposes "only as long as the lands remain part of the public domain." 35 Stat., at 464. By so providing, it is evident that Congress understood and intended that the opened lands were to be restored to the public domain.

recognized that restoration to the public domain language is synonymous with disestablishment. See, e.g., Rosebud Sioux Tribe v. Kneip, 430 U.S. at 589 & n.5; DeCoteau v. District County Court, 420 U.S. at 446; Mattz v. Arnett, 412 U.S. at 504 n.22; Seymour v. Superintendent, 368 U.S. at 354-55; Russ v. Wilkins, 624 F.2d 914, 915 (9th Cir. 1980), cert. denied, 451 U.S. 908 (1981); United States v. Southern Pacific Transportation Co., 543 F.2d at 696; United States ex rel. Cook v. Parkinson, 525 F.2d 120, 124 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977); United States ex rel. Feather v. Erickson, 489 F.2d at 100; United States ex rel. Condon v. Erickson, 478 F.2d at 688; Beardslee v. United States, 387 F.2d 280, 285 (8th Cir. 1967) (Blackmun, J.); Ellis v. Page, 351 F.2d 250, 251-52 (10th Cir. 1965); Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001, 1005 (D. Minn. 1971). See also United States v. Pelican, 232 U.S. 442, 445-46 (1914). The

Court's most recent pronouncement in this context, Rosebud Sioux Tribe v. Kneip, is a telling example that there can be no real argument over the significance of public domain language. Thus, while there was substantial disagreement over the outcome in that case, there was obvious agreement that restoration to the public domain language is, by itself, express language of disestablishment. Compare Rosebud Sioux Tribe v. Kneip, 430 U.S. at 589 & n.5 with id. at 618 (Marshall, J., dissenting). Moreover, the congressional and administrative materials from the era in question show that Congress and the Department of the Interior shared this understanding as to the significance of public domain language. See, e.g., H.R. Rep. No. 791, 50th Cong., 1st Sess. 3 (1888); H.R. Rep. No. 2967, 51st Cong., 1st Sess. (1890) at 1-2 (1890 Letter of the Secretary of the Interior), 2-3 (1890 Letter of the Commissioner of Indian Affairs); H.R. Rep. No.

3305, 51st Cong., 2d Sess. 1-2 (1890); [1890] Report of the Secretary of the Interior at XXIV; [1890] Report of the Commissioner of Indian Affairs at XXXVIII-XXXIX; [1891] Report of the Commissioner of Indian Affairs at 44; [1892] Report of the Secretary of the Interior at VII-VIII.

As the case law pertaining to the public lands and the public domain reveals, the rationale for this shared understanding is simple. It has long been settled law in this country that when a tract is lawfully appropriated or reserved for any purpose by the federal government, that tract loses its character as public lands, i.e., it is no longer a part of the public domain. See, e.g., Wilcox v. Jackson, 13 Pet. 498, 513 (1839); Leavenworth, Lawrence, and Galveston Railroad Co. v. United States, 92 U.S. 733, 745 (1875); Beecher v. Wetherby, 95 U.S. 517, 524 (1877); Missouri, Kansas, and Texas Railroad Co. v. Roberts, 152 U.S. 114, 118-19 (1894); Spalding

v. Chandler, 160 U.S. 394, 404-05 (1896); Scott v. Carew, 196 U.S. 100, 109-11 (1905). And, as has been repeatedly recognized, this rule is of particular force in regard to Indian reservations. See, e.g., Leavenworth, Lawrence, and Galveston Railroad Co., at 745; Missouri, Kansas and Texas Railroad Co. v. Roberts, at 119; Spalding v. Chandler, at 404-05. Hence the significance of restoration to public domain language to the disestablishment analysis is readily explainable: Because the reservation of a tract removes it from the public domain, the subsequent restoration thereof to the public domain (or its equivalent) signifies the termination of the reserved status of that land. It is evident then, that reservation status and public domain status are plainly incompatible and, therefore, restoration to public domain language and the like are of obvious significance in this context.

The preceding discussion establishes that it has always been the shared assumption of the courts, Congress, and the Department of the Interior that lands are not considered a part of the public domain if they are located within the boundaries of an existing Indian reservation. It follows then that when Congress used restoration to public domain language in opening reservation areas for entry and settlement, as it did in the 1908 Act, the intent was to terminate the reserved status of the area affected. Similarly, when either the courts or officials of the Department of the Interior treated such reservation areas as having been restored to the public domain, it was understood that the area affected had been disestablished.[16]

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16. It should be mentioned that there is some authority for the proposition that limitations upon the manner of entry, such as that contained in the 1908 Act (§ 2, 35 Stat., at 461-62), can negate restoration to public domain language. See Ute Indian Tribe v. State of Utah,

D. Subsequent Administrative and Legislative Treatment: Past-Tense and Related References

The significance to be attributed the subsequent jurisdictional history of the lands

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(cont.)
521 F. Supp. at 1122-23. As the previously cited authorities suggest, however, the imposition of such limitations is not, without more, indicative of a congressional intent to abandon the purpose of disestablishment underlying the use of public domain language. In this regard, it is particularly noteworthy that at least three separate surplus land acts which contain restoration to public domain language, or its equivalent, have contained similar limitations. See Act of July 4, 1884, 23 Stat. 76, 80 (Columbia Reservation Act); Act of March 3, 1873, § 1, 17 Stat. 633 (Round Valley Act); Act of March 2, 1889, § 21, 25 Stat. 888, 896 (Great Sioux Nation Act). Nevertheless, the historic reservation areas affected by these acts have been consistently treated as having been thereby disestablished. See, e.g., Rosebud Sioux Tribe v. Kneip, 430 U.S. at 589 and n.5 (1889 Act terminated reservation status of the restored area); Starr v. Long Jim, 227 U.S. 613, 619 (1913) (Columbia Reservation); Russ v. Wilkins, 624 F.2d at 915 (1873 Round Valley Act made a major change in the reservation). Thus, it is reasonable to conclude that the mere presence of limitations on the manner of entry has little, if any, bearing in this context.

at issue is a matter which was discussed at length by the Court in Rosebud, 430 U.S. at 603-05 and DeCoteau, 420 U.S. at 442, and needs no further amplification here. Subsequent administrative and legislative treatment otherwise has had a more checkered history in the disestablishment context. Several observations in regard to the record of that subsequent treatment present in the instant case are, therefore, appropriate.

It is, of course, well recognized that both a contemporaneous interpretation and a consistent, long-standing interpretation of a particular statute by the governmental agency and its officials responsible for administering that statute is entitled to great deference by the courts. See, e.g., United States v. National Association of Securities Dealers, Inc., 422 U.S. 694, 718-19 (1975) (consistent, long-standing administrative interpretation); Zuber v. Allen, 396 U.S. 168, 192 (1969) (contemporaneous administrative

construction); Russ v. Wilkins, 624 F.2d at 922-23. Disagreement as to the application of these principles in boundary litigation has most often arisen in regard to the significance to be attributed past-tense and like references. See, e.g., Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d at 959-60; City of New Town v. United States, 454 F.2d at 125-26; Ute Indian Tribe v. State of Utah, 521 F. Supp. at 1132-35, 1141-42 & nn. 189 & 191. In this regard, there is no question that as a general proposition these past-tense and related references are not without consequence, but can accurately reflect the current status of the area involved and hence, the intent of Congress.[17] See, e.g., Rosebud

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17. A number of historical administrative documents refer to the opened lands as "ceded". See App. B, Appendix to the Brief of the Amici Counties, Bartlett v. Solem, No. 82-1582 (8th Cir.) (a copy of which has been lodged with the Court). In Ute Indian Tribe v. State of Utah, the court held that "ceded" references

Sioux Tribe v. Kneip, 430 U.S. at 603 n.25, 609 n.38; Russ v. Wilkins, 624 F.2d at 925; United States v. Southern Pacific Transportation Co., 543 F.2d, at 696; Rosebud Sioux Tribe v. Kneip, 521 F.2d at 102 & n.54, 107 n.88, 110 & n.114, 113 n.134. It follows then, that the determination of the weight to

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(cont.)
contained in the record in that case were without significance because, as in the instant case, there had not been an actual cession. Id., 521 F. Supp. at 1118. On the contrary, the Amici submit that these references are a valid indicator of perceived disestablishment in this context. It is settled law that words of cession are "precisely suited" to disestablishment, even where the term is "technically misused." DeCoteau v. District County Court, 420 U.S. at 445; Rosebud Sioux Tribe v. Kneip, 430 U.S. at 597, 613. Thus, although the portion of the reservation opened under the 1908 Act was not technically ceded, the use of that term is nevertheless evidence of an understanding that the opened lands had been disestablished. See, e.g., Rosebud Sioux Tribe v. Kneip at 597-98. It follows then, that although these references are technically incorrect, the courts are not free to ignore the significance underlying their usage. See also United States ex rel. Cook v. Parkinson, 525 F.2d at 123; Rosebud Sioux Tribe v. Kneip, 521 F.2d at 112.

be accorded such subsequent treatment should be made on the basis of the actual record of that treatment and not on any vague notions as to the value or reliability of such references generally. And where, as in this case, the past-tense and like references show that the prevailing perception for many years was that the area in question had been disestablished, those references are entitled to considerable deference. Cf. Rosebud Sioux Tribe v. Kneip, 430 U.S. at 604-05 n.27 (no "consistent" or "dominant" approach in administrative materials); DeCoteau v. District County Court, 420 U.S. at 442 n.27 ("No consistent pattern emerges" in administrative documentation.).

Two separate but related arguments are usually made to negate the significance of the past-tense references. Specifically, it is often claimed: that these references are inadvertent or mistaken; and that they are confused because the same or contemporaneous

documentation also contains "present-tense" references to the historic reservation area involved. Compare DeCoteau v. District County Court, 420 U.S. at 442 n.27. In view of the extensive and repeated past-tense and like references contained in the historical record, however, neither of these claims can be considered persuasive. First of all, because there are numerous past-tense and like references, it can hardly be said that the references are either inadvertent or mistaken. On the contrary, their repeated use makes it quite apparent that such references had significance for their authors. Nor can it be said that these references are without import because some of the documents also contained so-called "present-tense" references. That is, by no means are these "present-tense" references indicative of confusion on the part of the authors. On the contrary, when read together -- as the various

references should be,[18] it becomes apparent that because the past-tense references were consistently and repeatedly used over a long period of time, often by the same author (see App. B, Appendix to Court of Appeals Brief of the Amici Counties cited at n.17, supra), the "present-tense" references were most likely just convenient, shorthand methods of designating the area being discussed and no more. In these circumstances then, it can be safely concluded that the so-called "present-tense" references were, in the words of this Court, "used in a geographical and not a legal sense. . . ." United States v. Oklahoma Gas & Electric Co., 318 U.S. 206, 216 (1943). In our view, this interpretation is considerably more satisfactory, at least where, as in this case, there are numerous past-tense and like

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18. And, doing so makes good sense since these references are often used in the same document or by the same author in a series of documents. See, e.g., App. B, Appendix to Court of Appeals Brief of the Amici Counties cited at n.17, supra.

references than to conclude that the responsible officials -- which includes the Secretary of the Interior and the Commissioner of Indian Affairs -- were in utter confusion and continually vacillated between perceptions of the status of the area.

E. Restoration of the Undisposed of Surplus Lands Under the 1934 Indian Reorganization Act

In a series of published orders, the Secretary of the Interior restored the undisposed of lands opened to entry under the 1908 Act to tribal ownership under the authority of § 3 of the Indian Reorganization Act (48 Stat. 984, 25 U.S.C. § 463). See 1 Fed. Reg. 1738 (Standing Rock); 6 Fed. Reg. 3300, amended 14 Fed. Reg. 471 (Cheyenne River); 17 Fed. Reg. 1065 (same); 22 Fed. Reg. 3693 (same); & 32 Fed. Reg. 14276 (same). From 1935 through the early 1970's, orders of this sort were issued. For example, there were orders of restoration involving the undisposed of surplus lands of the original Rosebud Indian

Reservation (3 Fed. Reg. 399), the historic Uintah Reservation (10 Fed. Reg. 12409), the original Fort Berthold Reservation (3 Fed. Reg. 1860, 13 Fed. Reg. 2416, & 26 Fed. Reg. 323); and the historic Flathead Reservation (e.g., 1 Fed. Reg. 666, 3 Fed. Reg. 5, 21 Fed. Reg. 6681, 23 Fed. Reg. 3854, 26 Fed. Reg. 4015, & 29 Fed. Reg. 16827). The Amici submit that the Cheyenne River and Standing Rock restoration orders are solid evidence of a long-standing understanding of perceived disestablishment, and accordingly, entitled to particular deference as such.

Section 3 of the Indian Reorganization Act authorizes the Secretary of the Interior, in certain circumstances, to restore to tribal ownership the undisposed of surplus lands of any Indian reservation previously opened to entry and settlement. In implementing this provision, the Department of the Interior has officially determined that it "applies both to lands which are part of an existing

reservation and to lands which were part of a reservation at the time the land was opened for sale. . . ." Russ v. Wilkins, 624 F.2d at 924 n.25. Thus, as this Court acknowledged in Rosebud, the fact that undisposed of lands in the area at issue were restored to tribal ownership under § 3 of that Act is not indicative, one way or another, of the Department's view as to the reservation status of that area. Id., 430 U.S. at 604 n.27. Nevertheless, these orders are, for a different reason, of consequence in boundary disputes.

In each of the orders of restoration involving lands opened pursuant to the 1908 Act at issue here, it was expressly provided that pursuant to the authority of § 7 of the 1934 Act (25 U.S.C. § 467), the restored lands were also to be "added to and made a part of

the existing reservation. . . ."[19] See 1 Fed. Reg. 1738-39; 6 Fed. Reg. 3300, as amended 14 Fed. Reg. 471; 17 Fed. Reg. 1065; 22 Fed. Reg. 3693; & 32 Fed. Reg. 14276. Section 7 authorizes the Secretary of the Interior, in his discretion, to "add" lands acquired pursuant to any provisions of the Act "to existing reservations," or where no reservation exists, to be proclaimed a "new" reservation. 48 Stat., at 985. If, in fact, the restored lands were already considered to be in reservation status, there would have been no need to expressly restore those lands to reservation status under the authority of § 7. And, in view of the fact that § 7 has often been used by the Secretary of the

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19. Section 7 proclamations are also contained in the Rosebud, Ute, Flathead, and Fort Berthold Restoration Orders cited above.

Interior independently of § 3 restorations[20] (see, e.g., 9 Fed. Reg. 14019; 46 Fed. Reg. 1040, 26562-563, 46407, 46681, & 47116-117; 47 Fed. Reg. 15162, 23812, 23813, 26243, & 31753), and the fact that the various § 7 orders carefully specify whether the declaration involves the addition to an existing reservation or creation of a new reservation (compare, e.g., 6 Fed. Reg. 3300, 10 Fed. Reg. 12409, and 46 Fed. Reg. 46407 with, e.g., 9 Fed. Reg. 14907-909, 46 Fed. Reg. 46681, and 47 Fed. Reg. 26243), it is likely that the Secretary did not lightly or needlessly employ § 7 in the restoration orders involved in this case. Thus, as the Rosebud restoration order (3 Fed. Reg. 399) attests, these orders faithfully and accurately reflect the perceived status of the area involved. It

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20. Conversely, from time to time, § 3 has been used alone. See, e.g., 3 Fed. Reg. 567-68; 3 Fed. Reg. 2223; 28 Fed. Reg. 3655-56; 35 Fed. Reg. 10601; 35 Fed. Reg. 12962; & 36 Fed. Reg. 17450.

is therefore evident that since these § 7declarations were not mere surplusage, the orders of restoration are strong evidence of perceived disestablishment here. See also United States v. Southern Pacific Transportation Co., 543 F.2d at 696 (congressional restoration of lands in question originally proposed by the Secretary of the Interior given weight).

F. Continued Federal Presence in the Area

Since the opening of the area at issue in 1910, the federal government has continued to have significant responsibilities in that area. This is largely the product of the trust status of allotments, tribal lands, and -- in earlier years -- unsold surplus lands (see generally Ash Sheep Co. v. United States, 252 U.S. 159, 164-66 (1920); United States v. Pelican, 232 U.S. at 447-50), and of the long-established guardian/ward relationship between the federal government and Indians. As a result, continued federal presence in

most opened areas has not only been assured, but has come to be expected. At the same time, though, this continued presence should not, by itself, have any bearing on the question of disestablishment of the non-Indian owned areas at issue here. See Rosebud Sioux Tribe v. Kneip, 430 U.S. at 615-16 n.48; DeCoteau v. District County Court, 420 U.S. at 442-43. As Rosebud and DeCoteau attest, there will often be continued federal presence in former reservation areas.

CONCLUSION

WHEREFORE, it is respectfully requested that the judgment of the Eighth Circuit be reversed.

Dated this 4th day of August, 1983.

Respectfully submitted,

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No. 82-[redacted]1253

IN THE

Supreme Court of the United States

October Term, 1982

No. 82-[redacted]1253

HERMAN S. SOLEM,
WARDEN, SOUTH DAKOTA STATE PENITENTIARY;
and MARK V. MEIERHENRY,
ATTORNEY GENERAL, STATE OF SOUTH DAKOTA,
Petitioners,

v.

JOHN BARTLETT,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR AMICUS CURIAE STATE OF MINNESOTA IN SUPPORT OF PETITIONERS SOLEM, ET AL.

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IN THE

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No. 82-

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INTEREST OF AMICUS CURIAE

The State of Minnesota has a historic and continuing interest in issues relating to the disestablishment of Indian reservations. There are eleven major Indian reservations in the state which are recognized by the United States Department of Interior. These reservations encompass approximately 2.5 million acres—about 4.6% of the total area of the state.

Many of Minnesota's reservations were subject in the late 1800's and early 1900's to surplus land acts which opened up parts of reservations to non-Indian settlement. These surplus land acts were similar to the statutes involved in the present case as well as to those construed in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) and *DeCoteau v. District County Court*, 420 U.S. 425 (1975). Minnesota submits this brief because of the potential impacts which a decision in this case might have on disestablishment issues within Minnesota borders.

SUMMARY OF ARGUMENT

The decision of the court of appeals threatens to recreate the uncertainties and ambiguities that existed prior to the cases of *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) and *DeCoteau v. District County Court*, 420 U.S. 425 (1975). States containing reservations affected by surplus land acts need clear rules from the Supreme Court for analyzing disestablishment issues. The Court, in a comprehensive opinion, should reaffirm the reasoning of the *Rosebud* and *DeCoteau* decisions and where necessary expand such reasoning in order to clarify any remaining questions about how to analyze the effects of surplus land acts.

ARGUMENT

The State of Minnesota already has been involved in extensive litigation over the question of whether surplus land acts diminished or disestablished reservations. *White Earth Band of Chippewa Indians v. Alexander*, 683 F.2d 1129 (8th Cir. 1982), *cert. denied*, —— U.S. ——, 103 S.Ct. 489 (1982); *Red Lake Band of Chippewa Indians v. State of Minnesota*, 614 F.2d 1161 (8th Cir. 1980), *cert. denied*, 449 U.S. 905 (1980); *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001 (D. Minn. 1971); *State v. Clark*, 282 N.W.2d 902 (Minn. 1979), *cert. denied*, 445 U.S. 904 (1980). There continue to be disputes within the state over the effects of past federal surplus land statutes on reservations not involved in the above lawsuits.

The purpose of this brief primarily is to emphasize to the Court that states like Minnesota need clear rules and guidelines for addressing disestablishment or diminishment issues. It is extremely important for states to know whether land within original reservation borders did or did not remain Indian country after the United States Congress enacted various surplus land statutes in the late nineteenth and early twentieth centuries. Serious jurisdictional consequences result from the interpretation of these statutes. If the surplus land acts did not affect reservation status, states are deprived of significant jurisdiction over the "opened" territory. Perhaps more important, non-Indians, whom the federal government initially urged to move onto reservations, may find themselves subject to the jurisdiction of Indian tribes rather than to the jurisdiction of the states of which they are citizens.

Minnesota had viewed the cases of *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) and *DeCoteau v. District County Court*, 420 U.S. 425 (1975) as going a long way toward clari-

fying many of the rules for determining disestablishment issues. However, the Court of Appeals for the Eighth Circuit in the present case has put much in doubt again.[1] This has put states, especially those within the eighth circuit, in a very difficult position. Once again we are confronting ambiguous or conflicting rules on very important questions. All in all, the *Bartlett* decision being appealed here seems to be a step backward.

The State of Minnesota urges the Court to address firmly and comprehensively the effects that surplus land acts had on reservations. This issue should not have to be litigated and appealed in every case, but that is still what is happening. The *Rosebud* and *DeCoteau* decisions substantially improved the framework for analyzing issues of disestablishment. Now the Court has the opportunity not only to reaffirm the principles of those two cases but also to give even clearer directions to states and to lower courts. The Court should make use of this opportunity. Enough jurisdictional conflicts and litigation involving Indian reservations already exist without continuing to add disestablishment issues to the list. It will be a benefit to everyone if the Court follows and further refines the reasoning set out in the *Rosebud* and *DeCoteau* decisions of 1977 and 1975.

This *amicus* brief will go no further into the merits of the *Bartlett* decision of the court of appeals. The details of the case are most comprehensively discussed by the petitioners and the other *amici curiae*. Minnesota's desire with this brief chiefly is to emphasize to the Court the necessity of a clear and comprehensive opinion consistent with the recent decisions in *Rosebud* and *DeCoteau*.

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[1] The Eighth Circuit has continued to create ambiguities over the *Rosebud* and *DeCoteau* rules in its recent decision in *Lower Brule Sioux Tribe v. South Dakota*, No. 82-1635, slip op. (June 27, 1983).

CONCLUSION

For the reasons discussed in this brief as well as the briefs of the petitioners and other *amici curiae*, the judgment of the court of appeals in this case should be reversed.

Dated: August 2, 1983.

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No. 82-1253

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OCTOBER TERM, 1983

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v.

JOHN BARTLETT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the Act of May 29, 1908 (35 Stat. 460 *et seq.*) immediately and irrevocably severed from the Cheyenne River Indian Reservation the area then opened up to purchase by settlers, so that the State of South Dakota (which has not assumed jurisdiction under Public Law 280) now enjoys criminal jurisdiction over offenses involving Indians occurring on non-Indian lands within the opened area.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1253

HERMAN S. SOLEM, WARDEN, and MARK V. MEIERHENRY, ATTORNEY GENERAL OF SOUTH DAKOTA, PETITIONERS

v.

JOHN BARTLETT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The special relationship of the United States to the Indian Tribes is too familiar to require restatement. It precedes the Constitution, was confirmed by it, and is evidenced in a long course of treaties and Executive Orders. The attendant national powers and duties are particularized in a multitude of Acts of Congress. Of immediate relevance here is the status of a remnant of the Great Sioux Reservation—itself established by treaty in 1868 and later reduced and broken up into segments by congressional legislation in 1889—as it may have been further diminished by an Act of 1908. The result will affect, inter alia, the continuing federal responsibility for

law enforcement within the disputed area under 18 U.S.C. 1152 and 1153.

In light of this continuing federal interest, the Court invited the Solicitor General to file a brief expressing the views of the United States at the jurisdictional stage. Now that the case is to be heard on the merits, we deem it appropriate to make a further submission.

STATEMENT

1. Respondent John Bartlett, an enrolled member of the Cheyenne River Sioux Tribe, pleaded guilty in 1979 in a South Dakota state court to a charge of attempted rape. The crime took place on an alienated parcel of land in Eagle Butte, South Dakota, which lies within the portion of the original Cheyenne River Indian Reservation that was opened to settlement by the Act of May 29, 1908, ch. 218, 35 Stat. 460 *et seq.* Pet. App. A2-A3.[1] After Bartlett's request for post-conviction relief was denied by the South Dakota court in which he had entered his plea (Pet. App. A2 n.1), he filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. (Supp. V) 2254, in the United States District Court for the District of South Dakota. There, he contended that the crime was committed in "Indian country", as defined in 18 U.S.C. (Supp. V) 1151, and that, accordingly, exclusive jurisdiction to prosecute him rested with the Sioux Tribe or the federal government. The State of South Dakota, on the other hand, argued that the 1908 Act terminated the reservation

[1] The Reservation was once part of the Great Sioux Reservation, established by the Treaty of Apr. 29, 1868, 15 Stat. 635 *et seq.*, from which the Black Hills area was taken in 1877. Act of Feb. 28, 1877, ch. 72, 19 Stat. 254 *et seq.* The Cheyenne River Reservation emerged as a separate unit in 1889, when another substantial portion of the large Reservation was ceded and the remainder was carved up into six distinct Reservations. Act of Mar. 2, 1889, ch. 405, 25 Stat. 888 *et seq.* See *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 589 (1977). As defined in 1889, the Cheyenne Sioux Reservation comprised about 2.8 million acres. The area opened in 1908 embraces some 1.6 million acres.

status of the portion opened to sale to non-Indians and divested the Tribe and the United States of jurisdiction over alienated lands in that area. Pet. App. A2-A3.[2]

2. The district court applied the rulings of the Court of Appeals for the Eighth Circuit in *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (1973), and *United States* v. *Dupris*, 612 F.2d 319 (1979), vacated and remanded, 446 U.S. 980 (1980), to the effect that the Cheyenne River Indian Reservation was not disestablished or diminished by the 1908 Act. Therefore, despite contrary decisions by the South Dakota Supreme Court,[3] the district court held that the State was precluded from exercising its criminal jurisdiction over Bartlett since the opened portion remained "Indian country" within the meaning of 18 U.S.C. (Supp. V) 1151. The court granted the writ of habeas corpus, but stayed the effect of its decision pending the outcome of any appeal. Pet. App. A1-A8, A96-A97.

3. The court of appeals, sitting en banc, affirmed (Pet. App. A9-A11), Judges McMillian and Arnold dissenting (Pet. App. A11-A12).[4] The court declined to overrule *United States* v. *Dupris*, and found that *Dupris*, *United States* v. *Long Elk*, 565 F.2d 1032 (8th Cir. 1977), and *United States ex rel. Condon* v. *Erickson*, were

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[2] It was correctly assumed by both parties that, having chosen not to invoke the option offered by Public Law 280 (Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 *et seq.*, as amended in 1968, now 18 U.S.C. 1162, 25 U.S.C. 1321-1326, 28 U.S.C. 1360), South Dakota could exercise no criminal jurisdiction over a tribal member within "Indian country," which includes alienated parcels embraced by federally recognized Indian Reservations. See *Williams* v. *United States*, 327 U.S. 711, 714 (1946); *Seymour* v. *Superintendent*, 368 U.S. 351 (1962); *United States* v. *John*, 437 U.S. 634 (1978).

[3] *South Dakota* v. *Janis*, 317 N.W.2d 133 (1982); *Stankey* v. *Waddell*, 256 N.W.2d 117 (S.D. 1977).

[4] The United States, the Cheyenne River Sioux Tribe, and the Standing Sioux Tribe participated as amici curiae in support of Bartlett. The Counties of Dewey, Corson and Ziebach, South Dakota, and Sioux County, North Dakota, participated as amici curiae in support of the State.

consistent with this Court's decision in *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975), and *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977). Pet. A10-A11.

INTRODUCTION AND SUMMARY OF ARGUMENT

The only issue before the Court is the continuing status as "Indian country" of a portion of one Indian Reservation in South Dakota. That question has been squarely decided against the claim of "diminishment" or "disestablishment" in at least three holdings of the Court of Appeals for the Eighth Circuit, *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (1973); *United States* v. *Dupris*, 612 F.2d 319 (1979), and the present case. See also, *United States* v. *Fay*, 668 F.2d 375 (1981), affirming in part a criminal conviction under 18 U.S.C. 1153 in respect of offenses committed at Eagle Butte without discussion of the jurisdictional issue. The first of these decisions has been cited and quoted with approval in *Mattz* v. *Arnett*, 412 U.S. 481, 497 n.19, 505 (1973), a precedent since reaffirmed by this Court. See *DeCoteau* v. *District County Court*, 420 U.S. 425, 444, 447-449 (1975); *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 586-587 (1977). What is more, on two occasions, the Eighth Circuit has expressly revisited its seminal *Condon* decision in light of this Court's more recent *DeCoteau* and *Rosebud* rulings and the contrary holdings of the South Dakota Supreme Court and has determined to adhere to its conclusion. *E.g.*, *United States* v. *Long Elk*, 565 F.2d 1032, 1034-1040 & n.10 (1977); *United States* v. *Dupris*, 612 F.2d at 321-323. And, now, after reconsidering the matter en banc, that court has firmly settled the question.

In this situation, there would normally be no occasion for further review. In *Seymour* v. *Superintendent*, 368 U.S. 351 (1962), *Mattz*, *DeCoteau* and *Rosebud*, this Court announced the governing guidelines. These have remained unchanged. As the Court was at pains to de-

clare in *DeCoteau* (420 U.S. at 447), "[w]e adhere without qualification to both holdings [*Seymour* and *Mattz*] and the reasoning of those decisions." No one can doubt that the court below has been meticulous in its attempt faithfully to apply those standards in each situation. It was, we stress, the Eighth Circuit that first found diminishment in the case of the Rosebud Reservation. *Rosebud Sioux Tribe* v. *Kneip*, 521 F.2d 87 (1975), aff'd, 430 U.S. 584 (1977). The court of appeals was then credited with a "careful and comprehensive opinion." 430 U.S. at 585. After giving the matter equally full consideration on three occasions, it cannot be faulted for reaching a different result, on different facts, in the case of the Cheyenne River Reservation.

We cannot suppose this Court is now inclined to reconsider its own decisions and to revisit every lower court ruling implementing them—especially those previously cited with approval.[5] Acquiescing in that invitation—apparently tendered by petitioners—would impose an awesome burden and entail very unsettling consequences for all concerned, Indians and non-Indians alike. Rather, we assume the Court has determined to review the present case because of the conflicting decisions of the South Dakota Supreme Court. *Stankey* v. *Waddell*, 256 N.W.2d 117 (1977); *South Dakota* v. *Janis*, 317 N.W.2d 133 (1982). Thus far, that court has declined to accept the ruling of the federal appellate court as settling this issue of federal law. Apparently, the South Dakota Supreme Court was most recently emboldened (in *Janis*) by this Court's action (446 U.S. 980 (1970)) vacating the Eighth Circuit's *Dupris* decision as probably moot.[6] See 317

[5] In *Mattz*, this Court listed the 1908 Act involved here as an example of an "opening" statute that did not work disestablishment and approvingly cited the Eighth Circuit's *Condon* decision, followed in this case. 412 U.S. at 497 n.19, 505 n.23.

[6] On remand, the case was ultimately mooted by the court of appeals' direction to the district court to grant the government's motion to dismiss the information against Dupris. 664 F.2d 169 (1981).

N.W.2d at 137-138. At all events, now that the Court has granted review, it is to be hoped that a clear message will emerge, discouraging other state courts from prolonging disruptive controversies over the status of Indian Reservations. We urge the Court to re-affirm the controlling standards and to conclude that they were correctly applied by the court of appeals.

A.

We begin by re-examining the Court's past decisions in an attempt to distill the general principles that govern issues of Reservation "termination," "disestablishment," or "diminishment." The critical question remains whether the statute invoked worked an immediate and irrevocable cession, or merely opened up a part of the Reservation to purchase by settlers, with the expectation that, in due course, the entire opened area would be acquired and then separated from the remaining Indian territory. Our submission is that where such an opening scheme substantially failed and a significant portion of the opened lands remained unsold when Congress changed policy and halted sales, the area retains Reservation status.

B.

Applying these guidelines to the present case, we conclude that the Cheyenne River Reservation has not been disestablished or diminished. The Act of 1908 involves no outright cession, nor even any agreement by the Tribe. It is, rather, a typical "opening" statute, indistinguishable from the legislation considered in *Seymour* and *Mattz*. And, unlike the result in *Rosebud*, most of the opened lands were never sold and were ultimately "restored" to full Reservation status. In other respects, also, the opened area of the Cheyenne River Reservation has remained Indian. In these circumstances, it seems consistent with both the historic intent of Congress and more recent legislative policy to preserve the original boundaries of the Reservation.

ARGUMENT

A. The Governing Principles

1. In considering questions relating to the "termination," "disestablishment" or "diminishment" [7] of Indian Reservations, we must remember that they almost inevitably arise out of congressional legislation enacted near the turn of the last Century, a time when the Political Branches were wholly committed to a policy designed, in due course, to liquidate the Reservation system and accomplish the assimilation of the Indian. The first step, exemplified by the Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388 *et seq.*, was to encourage—and shortly to compel—the Indian to abandon his roaming habits, his communal life, his "tribalism," and to become a self-sufficient farmer, tied to a homestead.[8] To that end, property ownership was to be individualized, and the not unimportant side benefit of allotting the Reservation land among the members would be to open up the substantial "surplus" to white settlers. Although the precise mechanisms varied, the ultimate objectives were always the same: "educating" and "civilizing" the Indian, relieving the federal Treasury of burdensome annual subsidy payments, and releasing "unneeded" tribal land for exploitation by others. In every case, moreover, the expectation was that, sooner or later,

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[7] Like Petitioners, we speak of "diminishment" as synonymous with "disestablishment" and "termination," but as applied to a discrete portion, rather than the whole of the Reservation. So used, all three terms imply that the affected area has entirely and permanently lost its Reservation status. In the case of "diminishment," the affected portion is jurisdictionally removed from the subsisting Reservation, whose boundaries are redrawn to exclude that area. It does not, of course, follow that the same meaning should be attributed to the word "diminished" whenever it occurs in Legislative or Executive Branch documents.

[8] There were, to be sure, much earlier experiments with allotment, mainly with the same objectives as the later legislation. But few such plans were fully carried out. See F. Cohen, *Handbook of Federal Indian Law* 98-102, 129-130 (1982 ed.).

perhaps within a generation, the Tribe and its Reservation would cease to exist. See generally, F. Cohen, *Handbook of Federal Indian Law* 206-217 (1942); J. Kinney, *A Continent Lost—A Civilization Won* (1937); D. Otis, *History of the Allotment Policy*, reprinted in *Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess., Pt. 9, at 428 *et seq.* (1934). See also, *Montana* v. *United States*, 450 U.S. 544, 559-560 n.9 (1981).

This perception might lead us to view as disingenuous all attempts at pursuing the exact intent of Congress in the period 1890 to 1910 when it allotted and opened up particular Reservations. Disregarding fine points, one might be tempted to rush to the conclusion that the Congressional purpose was plain enough in each instance: termination or "disestablishment" of the Reservation, merely preserving for a limited time in protected status individual Indian homesteads. The upshot of this indiscriminate approach would be to end the Reservation status of every Reservation that has ever been allotted—some four-fifths of the total.[9] While individual allotments held in trust or subject to restrictions would continue to be "Indian country" (see 18 U.S.C. (Supp. V) 1151(b)), the territorial integrity of most Reservations would be destroyed, tribal governments would lose much of their reason for being, and all the problems associated with "checkerboard" jurisdiction would emerge.

To acquiesce in these results would break many solemn treaty promises made to the Indian, and, at this late date, the unsettling effect would be extreme. But the dispositive consideration is that reading an intent immediately to disestablish into every turn of the century stat-

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[9] According to one compilation, of the 229 Indian Reservations existing in 1936 (which comprised approximately 136 million acres in 1887), only 48 (totalling about 22 million acres) escaped allotment and opening up. With the notable exception of the Navajo Reservation (encompassing some 16 million acres in 1936), most of the unallotted Reservations were relatively small. See J. Kinney, *A Continent Lost—A Civilization Won*, App. at 350 (table), 351-356 (table) (1937).

ute providing for the allotment and opening up of Indian Reservations would attribute to Congress and the Executive a more callous disregard of Indian welfare than the record justifies. Latter-day popular history exaggerates when it portrays the Government of the United States as wholly captive to the "familiar forces" of the times, ready to take the Indian's land by any means and without concern for his fate. As this Court stressed in *Mattz* v. *Arnett*, 412 U.S. 481, 496 (1973), although elimination of separate Reservations was the *ultimate* goal, the actual consequence of allotment was often to "continue the reservation system" for a limited time. See, also, *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 478-479 (1976).

So, also, to hold that all Reservations opened up in this period were then permanently disestablished would trivialize the effect of the Indian Reorganization Act of 1934, 25 U.S.C. (& Supp. V) 461 *et seq.* (IRA), and more recent legislation, which radically changed our approach to Indian affairs. See, *e.g.*, *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 151-158 (1973); *Mattz*, 412 U.S. at 496 & nn.17 and 18; *Moe*, 425 U.S. at 472-478; *Bryan* v. *Itasca County*, 426 U.S. 373, 388-389 n.14 (1976). Except as it is unavoidable, we ought not conclude that the remedy came too late for most Indians and most Reservations. This Court "cannot remake history." *DeCoteau* v. *District County Court*, 420 U.S. 425, 449 (1975); *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 615 (1977). But, where implementation was not completed, the Court need not carry forward into the 1980s a policy so firmly repudiated by Congress since the 1930s. See *Moe*, 425 U.S. at 478-479.

This is not "revisionism." As early as 1884 this Court entertained "no doubt" that, until the lands opened to settlers were sold, the Indians remained the equitable owners and that such areas could not be deemed "public lands." *United States* v. *Brindle*, 110 U.S. 688, 693 (1884). A few years later, the reserved status of similar lands was held to defeat a state's claim to included school sections. *Minnesota* v. *Hitchcock*, 185 U.S. 373, 394-402

(1902).[10] See, also, *United States* v. *Thomas*, 151 U.S. 577 (1894); *Wisconsin* v. *Hitchcock*, 201 U.S. 202 (1906). By 1909, the Court had established a presumption against termination or diminishment of Reservations and the elimination of the protective federal umbrella. *United States* v. *Celestine*, 215 U.S. 278, 285-287, 290-291; *United States* v. *Sutton*, 215 U.S. 291, 294-295. See, also, *Spalding* v. *Chandler*, 160 U.S. 394, 403-405 (1896). And, in the next three decades, there followed a host of decisions reflecting the same solicitude to maintain the special status of Indian land. *E.g.*, *Hollowell* v. *United States*, 221 U.S. 317 (1911); *Choate* v. *Trapp*, 224 U.S. 664 (1912); *Ex parte Webb*, 225 U.S. 663 (1912); *Donnelly* v. *United States*, 228 U.S. 243 (1913); *United States* v. *Mille Lac Band of Chippewas*, 229 U.S. 498, 509 (1913); *United States* v. *Sandoval*, 231 U.S. 28 (1913) (disapproving *United States* v. *Joseph*, 94 U.S. 614 (1877)); *United States* v. *Pelican*, 232 U.S. 442 (1914); *United States* v. *Nice*, 241 U.S. 591 (1916) (overruling *In re Heff*, 197 U.S. 488 (1905)); *United States* v. *Soldana*, 246 U.S. 530 (1918); *Ash Sheep Co.* v. *United States*, 252 U.S. 159 (1920); *United States* v. *Candelaria*, 271 U.S. 432 (1926); *United States* v. *Ramsey*, 271 U.S. 467 (1926); *United States* v. *Chavez*, 290 U.S. 357 (1933); *United States* v. *McGowan*, 302 U.S. 535 (1938).

These early precedents make clear that the Court was adhering to a consistent approach when, more recently, it expressly affirmed the principle that allotment and opening up of tribal lands does not presumptively end the Reservation or reduce its boundaries. *Seymour* v. *Superintendent*, 368 U.S. 351 (1962); *Mattz* v. *Arnett*, *supra*; *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. at 478-479. That remains the rule today, as the Court summed it up in *DeCoteau*, 420 U.S. at 444:

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[10] Unlike some later opening legislation, the 1889 Act involved in *Minnesota* did not contain a special "school provision," stipulating outright purchase by the United States of Sections 16 and 36 and conveyance to the State. See n.14, *infra*.

> This Court does not lightly conclude that an Indian reservation has been terminated. "[W]hen Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." *United States* v. *Celestine*, 215 U.S. 278, 285. The congressional intent must be clear, to overcome "the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'" *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 174, quoting *Carpenter* v. *Shaw*, 280 U.S. 363, 367. Accordingly, the Court requires that the "congressional determination to terminate • • • be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz* v. *Arnett*, 412 U.S., at 505. See also *Seymour* v. *Superintendent*, 368 U.S. 351, and *United States* v. *Nice*, 241 U.S. 591. In particular, we have stressed that reservation status may survive the mere opening of a reservation to settlement, even when the moneys paid for the land by the settlers are placed in trust by the Government. *Mattz* v. *Arnett*, *supra*, and *Seymour* v. *Superintendent*, supra.

See, also, *Rosebud*, 430 U.S. at 586-587 ("The mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status."); cf. *United States* v. *John*, 437 U.S. 634 (1978).

To be sure, as *DeCoteau* and *Rosebud* illustrate, there are instances in which a Reservation must be found to have been irrevocably terminated or diminished. See pp. 14-17, *infra*. But the teaching of this Court over three-quarters of a century remains that such a finding requires very clear evidence of congressional intent to effect a present—and not merely an eventual—dissolution or dismemberment of the Reservation. In assessing that intent, we must of course be attentive to the contemporary

understanding. But, again, it is essential to distinguish future expectations from immediate consequences.[11]

2. How then do we distinguish between action effectively ending the Reservation status of the whole or a part of recognized Indian lands and a mere opening up of such lands? As we have said, legislation enacted between 1890 and 1910 was written, often carelessly, in the expectation that the entire Reservation system would be dismantled within a relatively short span. And it is equally clear that "Reservation status" for alienated lands was not yet a familiar concept.[12] Accordingly, we should

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[11] In this context, it is important to remember that the only parties to any cession were the Tribe and the United States. Future settlers, albeit intended beneficiaries, can claim only what the Congress secured, not some larger immunity they may have supposed would attach to their acquisition of surplus Indian land. At all events, the "legitimate expectations" of white settlers can be accommodated without destroying the Reservation status of opened areas. See *Montana* v. *United States*, 450 U.S. at 559-561 & n.9. But, whatever the equities may be in favor of individual holders of "fee" parcels who are challenging Reservation ordinances, no comparable claim can be asserted by the state and its counties. They plainly were not parties, directly or indirectly, to any agreement or legislation touching the status of the Reservation. The interest the states and counties now assert—seldom clearly articulated—cannot help us in determining the original understanding.

[12] At the time, the usual focus was as to whether former tribal lands remained "Indian country" for purposes of exercising federal criminal jurisdiction and prosecuting violations of federal liquor law that were restricted to "Indian country." The prevailing view was that fully alienated tracts, including unrestricted allotments of tribal members, ceased to be "Indian country." *E.g.*, *Bates* v. *Clark*, 95 U.S. 204 (1877); *Dick* v. *United States*, 208 U.S. 340 (1908); *Clairmont* v. *United States*, 225 U.S. 551 (1912). It was only in 1932 (Act of June 28, 1932, ch. 284, 47 Stat. 336 *et seq.*) that ceded rights-of-way across Reservations were included, and in 1948 (see 18 U.S.C. 1151(a)) that all lands within a Reservation, including those patented in fee, were declared "Indian country." The question of *tribal* jurisdiction over non-Indians on alienated parcels within the Reservation was not then a live issue, except in the case of the Civilized Tribes of the Indian Territory. There,

not be surprised, in most cases, to find no express legislative discussion of Reservation status or Reservation boundaries as affected by opening up of tribal lands for sale to settlers. In the climate of the times, the only meaningful question is whether the legislation meant to accomplish a *present, unequivocal* and *irrevocable* transfer of Reservation lands from the Tribe to the United States.

a. In the treaty days, before 1871, such cessions were, of course, quite frequent. Even though part or even the whole of the "price" was often to be paid in installments (whether in money or in kind, or both) over several years, the typical treaty cession leaves no doubt that the transfer was complete upon ratification. *E.g., United States* v. *Omaha Tribe of Indians*, 253 U.S. 275 (1920).[13] Like "cessions," expressly so termed, were subsequently accomplished by formal "agreement," incorporated in Acts of Congress. That was the form of the transaction by which the Black Hills were severed from the Great Sioux Reservation in 1877, and much other land in 1889. See Act of Feb. 28, 1877, ch. 72, 19 Stat. 254 *et seq.*; Act of Mar. 2, 1889, ch. 405, 25 Stat. 888 *et seq.* Similar cession agreements effected the disestablishment of the North Half of the Colville Reservation and the termination of the Lake Traverse Reservation. See *Seymour*, 368 U.S.

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however, tribal taxing authority over activities in alienated town sites was sustained. *Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905), appeal dismissed, 203 U.S. 599 (1906). See, also, *Morris* v. *Hitchcock*, 194 U.S. 384, 392 (1904), citing with approval an Attorney General's opinion upholding tribal taxation of hay exports from the Reservation even if the non-Indian taxpayer were "the absolute owner of the land on which the hay was raised." This history is recounted in *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 139-144 (1982).

[13] Even then, there were exceptions. Some treaties provided for payment of "ceded" lands, at least in part, by turning over to the Tribe the proceeds of sale received from settlers. In such cases, the Court characterized the cession as incomplete until the tracts were sold, holding that the Indians remained the equitable owners and that the ceded area should not be deemed "public lands." *E.g., United States* v. *Brindle, supra.*

at 355; *DeCoteau*, 420 U.S. at 455; *id.* at 455-460 (App. A to opinion). And there are many other instances. See, *e.g.*, *Mattz*, 412 U.S. at 504 n.22; *DeCoteau*, 420 U.S. at 439-440 n.22. See, also, the Act of June 6, 1900, ch. 813, 31 Stat. 672 *et seq.*, upheld in *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903).

Sometimes, to be sure, the purported "agreement" had not been approved by the requisite number of tribal members stipulated in an earlier treaty, or consent had been induced by questionable methods. *E.g.*, the case of the Black Hills, discussed in *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 381-382 & n.13 (1980). But, in light of *Lone Wolf*, that is irrelevant to our inquiry. The critical fact in all these cases is that Congress exacted a *present and total surrender of all tribal interest* in the ceded land in return for an *unconditional commitment* by the United States to an agreed payment, even if inadequate or delayed. Although, usually, the Government immediately opened the area to settlers, the Indians, having irrevocably and completely divested themselves of title for a fixed price, had no interest in those subsequent events.

b. On the other hand, during the decade preceding and especially that following 1900, there were more numerous arrangements under which the United States, with or without the formal concurrence of the Tribe, opened up tribal lands to sale without any firm obligation to do more than credit or pay over the proceeds to the Tribe when realized.[14] In effect, the Government was a mere

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[14] There was, commonly, a special exception for "school sections" within the opened area, which were purchased outright by the United States and conveyed to the state. See, *e.g.*, Act of Apr. 27, 1904, ch. 1624, 33 Stat. 352 *et seq.*, quoted in the following note. But, as *Ash Sheep* makes clear, such a provision has no effect on the continuing Indian status of the remaining lands opened up. See pp. 17-19, *infra*. The Court reiterated this view as recently as *DeCoteau*, 420 U.S. at 445-446 n.33: a "school provision" of this kind "implies nothing about the presence or absence of state civil or criminal jurisdiction over the remainder of the ceded lands." A sufficient example is the Crow Allotment Act of June 4, 1920, ch. 224, § 16, 41 Stat. 756, which provided for the purchase by the

sales agent. No doubt, the primary motive for resorting to this type of scheme was to avoid committing the United States to any independent financial obligation.[15] And it was presumably anticipated that, in due time, all tracts would be sold and that the upshot would be the same as in the case of a straightforward cession. But, until that day, the transfer was incomplete.

Unsurprisingly, the clear line between outright cession and mere opening up of tribal lands was not always observed. As *Rosebud* illustrates, Congress sometimes combined features of both schemes in a given case. Thus, the 1904 Act affecting a portion of the Rosebud Sioux Reservation grew out of a straightforward cession agreement with the Tribe, but the payment provisions were trans-

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United States and grant to the State of Montana of Sections 16 and 36 within the Crow Reservation. No one has ever contended that this legislation affected the status or boundaries of the Reservation. See *Montana* v. *United States*, 450 U.S. at 548. Since Montana was admitted by the same Enabling Act as South Dakota, we must assume the Court was misled in *Rosebud* in suggesting that implementation of an Enabling Act school section grant within Indian country implies disestablishment of the affected portion of the Reservation. See 430 U.S. at 599-601. In our view, *DeCoteau* correctly concluded that a school section provision is wholly neutral on the issue of disestablishment.

[15] An express statement of this concern is reflected in Section 8 of the Crow Agreement, incorporated in the Act of Apr. 27, 1904, ch. 1624, 33 Stat. 361, quoted in *Ash Sheep*, 252 U.S. at 165-166:

> That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided.

This was a standard provision in opening up legislation, including the 1908 Act now before the Court. See Pet. Br. App. A14-A15.

muted by the Congress so as to resemble a typical opening up arrangement. See 430 U.S. at 590-598. In part because the immediate cession language was retained in the first statute (*id.* at 591, 596-597) and because the later Acts of 1907 and 1910 were seen as derivative legislation, carrying forward the same "baseline" objective (430 U.S. at 605-615), the Court concluded that an intent immediately to diminish the Reservation must be found. But we do not read *Rosebud* as erasing the traditional distinction.[16] The rule of *Seymour* and *Mattz* has not

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[16] Notwithstanding what was written in *Rosebud*, 430 U.S. at 613-614 & n.47, we fail to appreciate the significance for Reservation status of a provision prohibiting the introduction of liquor into an "opened" area for twenty-five years—at least when, as there and here, it encompasses "lands allotted, those retained or reserved," as well as "surplus land sold, set aside for town-site purposes, granted to the State * * * or otherwise disposed of." See Act of May 30, 1910, ch. 260, § 10, 36 Stat. 451 (Rosebud Act); Act of Feb. 17, 1910, ch. 40, 36 Stat. 196 *et seq.*, amending Section 8 of the 1908 Act before the Court (Pet. Br. App. A18-A20). Under the Act of July 23, 1892, ch. 234, 27 Stat. 260 *et seq.*, as amended by the Act of Jan. 30, 1897, ch. 109, 29 Stat. 506 *et seq.*, the prohibition already applied to all restricted allotments whether or not within a Reservation, but, at least by clear implication, did not cover unrestricted allotments or alienated parcels even inside a Reservation. See *United States* v. *Sutton*, 215 U.S. at 293. See also, n.12, *supra*. Indeed, that is the general rule today with respect to "non-Indian communities" within Reservations. 18 U.S.C. 1154(c); see *United States* v. *Mazurie*, 419 U.S. 544 (1975). It follows that the provisions in the 1910 statutes quoted above were redundant with respect to allotments (until the restrictions were removed), but important as they affected alienated lands, even if the Reservation boundaries remained unchanged.

Again, the point is illustrated by the Crow Allotment Act of 1920, which, in Section 9 (41 Stat. 754), extended the liquor prohibition to fee tracts within the Reservation (including unrestricted allotments held by Indians, lands alienated to others, and state school sections)—an action which no one has suggested disestablished or changed the boundaries of the Crow Reservation. So, also, a like statute covering the Colville Reservation did not affect the result in *Seymour*. See Act of Aug. 31, 1916, ch. 424, 39 Stat. 672 *et seq.*, noticed by the Court, 368 U.S. at 356 n.12.

been repudiated and presumably continues to govern in any like situation.

3. The immediate consequences of opening up legislation not involving an unconditional present cession are clear enough. Putting aside allotments selected in the opened area and any school sections purchased outright for the state, the Tribe retained its beneficial title to the land until sold, as well as the right to any profits derived from their use. Only Indian occupancy rights were suspended—so that the land could be offered, more invitingly, with "vacant possession." In sum, as this Court repeatedly held in a series of cases including *Brindle*, *Mille Lac Band of Chippewas*, *Minnesota* v. *Hitchcock* and *Ash Sheep*, while unsold, such opened lands remained Indian for most purposes. The last decision states the situation aptly (252 U.S. at 165-166):

> It is obvious that the relation thus established by the act between the Government and the tribe of Indians was essentially that of trustee and beneficiary and that the agreement contained many features appropriate to a trust agreement to sell lands and devote the proceeds to the interests of the *cestui que trust*. *Minnesota* v. *Hitchcock*, 185 U.S. 373, 394, 398 * * *.
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> Taking all of the provisions of the agreement together we cannot doubt that while the Indians by the agreement released their possessory right to the Government, the owner of the fee, so that, as their trustee, it could make perfect title to purchasers, nevertheless, until sales should be made any benefits which might be derived from the use of the lands would belong to the beneficiaries and not to the trustee, and that they did not become "Public lands" in the sense of being subject to sale, or other disposition, under the general land laws. *Union Pacific R.R. Co.* v. *Harris*, 215 U.S. 386, 388. They were subject to sale by the Government, to be sure, but in the manner and for the purposes provided for in the

> special agreement with the Indians, which was embodied in the Act of April 27, 1904, 33 Stat. 352, and as to this point the case is ruled by the *Hitchcock* and *Chippewa Cases*, *supra*. Thus, we conclude, that the lands described in the bill were "Indian lands" * * *.[17]

It is plain that the continuing tribal interest in the lands opened under these arrangements was not merely a right of reversion in the event the lands were never sold and the Government continued to decline to purchase them itself. There was not a completed sale, subject only to a condition subsequent. Nor was the Government "taking" the land without payment, exposing itself to an obligation, in due course, to make "just compensation" out of Treasury funds if settlers failed to provide the price. Compare *United States* v. *Sioux Nation of Indians*, *supra*. Indeed, the Congress expressly excluded that possibility. See n.15, *supra*. The transfer was, rather, an incomplete transaction, held in abeyance until payment should be

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[17] Usually, the lands "opened" under this type of legislation were not simply made available to all comers under the provisions of the general public land laws; rather, their disposition was governed by special conditions, typically involving classification and appraisal, installment payments, and, if no purchasers appeared after seven years, sale at public auction. A common provision expressly stipulated that "no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in [the President's] proclamation." *E.g.*, Sections 2-5 of the 1908 Act (35 Stat. 461-463) involved here, Pet. Br. App. A4-A12. And, of course, the proceeds of sale did not go to the Treasury as unrestricted moneys, but were required to be credited to the Tribe, with interest. *E.g.*, Section 6 of the same Act (35 Stat. 463), Pet. Br. App. A12. Obviously, this was a far cry from simply "restoring" the area unconditionally to the "public domain."

We note that the statutes involved in *Ash Sheep* and *Minnesota* v. *Hitchcock* incorporated agreements with the Tribe which purported to "cede" the lands that were to be opened to sale. But the Court looked to the substance of the transaction, not the terminology, and concluded that the "cession" was conditional, in effect suspended until and unless sales to settlers were realized. *A fortiori*, that must be the result where no agreement and no words of cession are present.

received from homesteaders. For the time being, the Indians' possessory rights were suspended, but that is all. And, at some point, if the scheme failed for lack of purchasers, the Tribe's right to resume occupancy presumably must be conceded—even without the benefit of "restoration orders" under the Indian Reorganization Act of 1934.[18] In the interim, the Indians' title had survived and there was no basis for altering the Reservation boundaries.[19]

The early cases, it is true, dealt only with *unsold* "surplus" lands. But, given that these retained their Reservation status—even if partially suspended—it would be incongruous to conclude that new boundaries should be drawn, in a crazy-quilt pattern, to exclude alienated parcels after Congress determined that they, also, should be

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[18] Section 3 of the IRA, 25 U.S.C. 463, authorized the Secretary of the Interior "to restore to tribal ownership the remaining surplus lands of any Indian reservation [heretofore] opened." Since legal title was to remain with the United States and the Tribe had never lost beneficial title, the practical effect of restoration orders under this provision was to return *use and occupancy rights* to the Tribe. As the Senate Report accurately recited, Section 3 of the IRA was intended to restore unsold "surplus" tracts "to tribal use." S. Rep. 1080, 73d Cong., 2d Sess. 2 (1934). Stated differently, restoration orders ended the suspended status of such areas. As we have said, that result must have occurred sooner or later if the surplus lands remained unsold for a very extended period. But the IRA and the restoration orders issued under it serve the useful function of mooting the question whether, in a given case, lapse of time had already effectivly ended the "opening" of tribal lands. Plainly, such restoration orders are not evidence that the Reservation status of the affected lands had been irretrievably lost. See *Rosebud*, 430 U.S. at 604 n.27.

[19] It is worth noting that Interior Department Regulations promulgated in 1912 "contemplated that remaining surplus lands, the proceeds of the disposal of which were for the benefit of the Indians, would be cooperatively administered by the Indian Office and the General Land Office, the Indian Office retaining jurisdiction of the use of the lands before they were sold and the General Land Office administering the final disposition of the lands." See 56 Interior Dec. 330, 339 (1938).

deemed "Indian country." 18 U.S.C. (Supp. V) 1151(a). At all events, that is what this Court squarely decided in *Seymour* and re-affirmed in *Mattz*.

4. There is a final caveat. In cases where the opened area of a Reservation was entirely—or almost entirely—sold off to non-Indian settlers before the process was halted by the change of policy enacted in 1934, it may well be right to treat the Reservation as diminished today. This is not merely a bow to current reality. Nor is it an impermissible attempt to construe turn of the century legislation in accordance with unpredictable future events. On the contrary, we reasonably may suppose that the sponsors of "opening up" legislation would have intended to end the Reservation status of the affected area *if and when* their expectations were fully realized, but not otherwise.[20] Then, as now, it must have seemed artificial to continue to treat as part of an Indian Reservation a discrete area, typically of large dimensions, once both land ownership and population had ceased to be Indian. Per contra, where no present cession was involved and disappointingly few settlers had taken up Congress's invitation, there was, and is, no justification for jurisdictionally separating from the Reservation "core" an adjacent tract that remains significantly Indian in every respect.

All else aside, this explains the result in *Rosebud*. As the Court there stressed, of the more than 2 million acres opened up by the Acts of 1904, 1907 and 1910, only some 4,600 remained unsold in 1938. 430 U.S. at 588 n.3. And, today, more than 90% of the opened area is non-Indian, both in population and land use. *Id.* at 605. In these circumstances, it was obviously difficult to conclude that

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[20] Where allotments, normally restricted for 25 years, were provided for in the opened area, it would be reasonable to suppose that the "Indian" character, or "Reservation status," of that area was intended to lapse at the end of the 25-year period—which also coincided in some cases with the time when the liquor prohibition would cease—assuming that, by then, the surplus lands also had been fully disposed of. See *Mattz*, 412 U.S. at 496.

Congress would have wished the affected area to retain Reservation status. At some point, the tail can no longer wag the dog.[21]

So saying, we imply no "majority rule" under which the status of opened tribal lands depends upon whether more or less than half the acres, or the population, remain Indian. One of the familiar consequences of the allotment policy is that, as a result of numerous exceptions to the restrictions on alienation, much of the acreage of even the unopened portion of some Reservations is today in non-Indian hands. *E.g.*, *Montana* v. *United States*, 450 U.S. at 548 (Crow Reservation); *United States* v. *Mitchell*, No. 81-1748 (June 27, 1983), slip op. 3. So, also, the concentration of a large non-Indian population in a few alienated town sites within a Reservation sometimes left the Indians grossly outnumbered. *E.g.*, *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 470 (1979). Since these disparities do not affect the status of the Crow Reservation, the Quinault Reservation, or the Yakima Reservation, there is no cause to treat like patterns of land ownership or population as inconsistent with Reservation status for once opened areas. It is only when the Indian character of former tribal lands is wholly destroyed that it seems justifiable to sever the area from the Reservation.

B. The 1908 Act

Applying the principles just outlined to the case before the Court yields a clear conclusion against diminishment

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[21] This likewise explains the ultimate redrawing of Reservation boundaries to exclude the opened area of the Red Lake Reservation considered in *Minnesota* v. *Hitchcock*, and the area of the Crow Reservation affected by the 1904 Act involved in *Ash Sheep*. In both cases, almost all the unallotted land in the opened portion of the Reservation was sold before 1934. See *United States* v. *Holt State Bank*, 270 U.S. 49, 52-53 (1926). In the case of the Crow Reservation, only some 10,000 acres (out of a total of more than 1 million acres) in the area opened by the 1904 Act remained unsold, as attested by the "restoration" Act of May 19, 1958, Pub. L. No. 85-420, 72 Stat. 121.

of the Cheyenne River Reservation. The points are quickly stated.

1. First and foremost, the 1908 Act involved here is typical opening up legislation, of a piece with the statutes considered in *Seymour* and *Mattz*. There was no present cession for an agreed price, but, instead, an arrangement whereby the Government—expressly avoiding any obligation to buy itself—undertook to sell tribal lands to settlers for the account of the Tribe. No language of cession is to be found, nor any other terms "precisely suited" to disestablishment. Indeed, there was no prior agreement with the Tribe.

The basic character of the congressional action is perfectly clear. It cannot be changed into an immediately effective cession merely because the drafters carelessly spoke of the unopened portion of the Reservation as "diminished" in one place (§ 2 (35 Stat. 461); Pet. Br. 19-20), and, in another (§ 9 (35 Stat. 464); Pet. Br. App. A16), to the opened area as "part of the public domain." These were, of course, half-truths. Except for any allotments selected in the territory opened to settlers, the area of Indian occupancy *was* diminished temporarily; and, ultimately, if all went as expected, the Reservation would be permanently reduced in size. Similarly, although the opened area could not accurately be assimilated to the "public domain" because it remained encumbered by tribal equitable ownership and was only made available to settlers on special conditions,[22] those lands were, for the time being, given some of the attributes of "public lands." [23]

At all events, such convenient short-hand references to the two portions of the Reservation cannot overcome the

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[22] See n.17, *supra*.

[23] The "surplus lands" were, after all, opened to entry under some of the "public land laws," albeit with significant qualifications. Perhaps the most useful short-hand description of unsold "surplus" lands opened to sale is that given by the Interior Department Solicitor in 1938 (56 Interior Dec. at 338): "qualified public lands and also qualified Indian lands."

detailed provisions of the statute. Cf. *Mattz*, 412 U.S. at 498. Knowing the true nature of the arrangement, we cannot be misled by a wrong label. In all essential respects, the 1908 Act is indistinguishable from the statutes examined in *Seymour* and *Mattz* and the consequences should be the same.[24]

2. Resort to legislative history gives no different answer. To be sure, the Indians were briefly consulted as to their willingness to part with the area to be opened. Since it was anticipated that purchasers would be found for all the lands, the Government representative quite understandably did not advert to the legal status of the area in the event that expectation was disappointed. And it is equally unsurprising that tribal spokesmen did not discuss that eventuality. Interestingly, one tribal leader preferred to have the Government "buy [the surplus lands] outright," fearing that "it [would] take years for all of the land to be disposed of." Pet. Br. App. A153. He was firmly told that a "lump sum" payment was impossible because "Congress will not accept anything of that kind." Pet. Br. App. A158. Nevertheless, the Indians presumably believed that white men wanted the land and would buy it sooner or later, and that, except for allotments, the entire area would be taken. Given that premise, there is nothing in the minutes of the truncated Indian meetings held by Inspector McLaughlin or

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[24] The Act of Mar. 22, 1906, ch. 1126, 34 Stat. 80 *et seq.*, considered in *Seymour*, is identical to the present statute except that (1) it does not contain a "school section" provision or one prohibiting the introduction of intoxicants, and (2) it provided for sale, rather than reservation of minerals on the opened tracts. As we have already noted, the first difference is irrelevant to our inquiry. The second, on the other hand, cuts in favor of continued Reservation status here.

The Act of June 17, 1892, ch. 120, 27 Stat. 52 *et seq.*, considered in *Mattz*, is much more abbreviated. If anything, it is more susceptible to being construed as a "termination" statute because the opened lands are made available under the land and mineral laws *without condition*. This was more arguably a "restoration to the public domain" than can be found in the 1908 Act now before the Court.

in his report that casts useful light on our question. What is relevant, however, is that, at the end of the day, no cession resulted. The Tribe, told it had no real option in light of *Lone Wolf*, mostly listened and never fully acquiesced in the opening arrangment. See, *e.g.*, Pet. Br. App. A124-A125, A127-A129, A141, A145-A146, A152, A161.[25]

Nor do the congressional debates and reports offer more. Again, although the Congress was careful not to commit itself to any payment from the Treasury (except for school sections), the prevailing optimism foreclosed any discussion of the consequences if homesteaders did not come forward in sufficient numbers. In these circumstances, no significance can be attached to a reference to the Reservation in one Committee Report as "diminished" (Pet. Br. App. A28). Indeed, another Report speaks of surplus lands "on the Cheyenne River and Standing Rock Indian reservations" (Pet. Br. App. A21, A36).

Finally, an amending statute of 1910 is invoked (Pet. Br. App. A17-A20). Reinstating the figure recommended two years earlier, that legislation increased (from $1.50 to $2.50 per acre) the price to be paid for the school sections, and, accordingly, made a larger appropriation for that purpose. See S.D. Counties' Br. App. C1-C51. Beyond this, the 1910 Act subjected the entire original Reservation to existing laws prohibiting the introduction of intoxicants into Indian country (Pet. Br. App. A19-A20). For the reasons already given (n.16, *supra*), we cannot construe this action as bearing on the issue of diminishment or disestablishment. At all events, this later statute, enacted *at the request of the Tribe*, can hardly affect what is claimed to have been a

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[25] In fact, one of the few tribal leaders present asked for more time to consider the matter in full Council and was cavalierly told to communicate the Tribe's views to the Agency Superintendent, who must forward them to reach Washington within two weeks. See Pet. Br. App. A50, A161. Unsurprisingly, no such communication was received before Inspector McLaughlin submitted his report. Pet. Br. App. A50-A51.

present cession two years earlier. See S. Rep. 518, 61st Cong., 2d Sess. 3, 5 (1910).

3. The subsequent history, as in most like cases, is confused and rife with inconsistencies. See *Seymour*, 368 U.S. at 356 n.12; *Mattz*, 412 U.S. at 484-485; *DeCoteau*, 420 U.S. at 442-444; *Rosebud*, 430 U.S. at 603-605. For the most part, it is no more reliable here than elsewhere in deciding the diminishment issue. Nevertheless, we may notice two points.

From the first, there were references to the opened area as a continuing part of the Reservation, both in Acts of Congress,[26] congressional reports and debates,[27] and executive documents.[28] So, also, the approved tribal constitution of 1935 gave the Tribe jurisdiction over the whole undiminished Reservation. See Pet. Br. 60.

Nor is the early jurisdictional history as one-sided as petitioners suggest. To be sure, in *United States* v. *La Plant*, 200 F. 92 (D.S.D. 1911), a district court, on questionable reasoning, declined jurisdiction of a homicide by one non-Indian against another in the opened area,[29] and

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[26] *E.g.*, the Act of June 23, 1910, ch. 369, 36 Stat. 602, authorizing the sale to a railroad of a tract in the opened area described as "in the Cheyenne River Reservation"; and Section 2 of the Act of Mar. 4, 1921, ch. 174, 41 Stat. 1447, permitting extension of time for payment of installments due by purchasers of land "in the Cheyenne River Reservation."

[27] *E.g.*, H.R. Rep. 1046, 61st Cong., 2d Sess. (1910); S. Rep. 723, 61st Cong., 2d Sess. (1910); H.R. Rep. 315, 62d Cong., 2d Sess. (1912); S. Reps. 209 and 216, 62d Cong., 2d Sess. (1912); 45 Cong. Rec. 5799-5810 (1910).

[28] References to the opened lands as "in" or "within" the Reservation occur in the President's opening Proclamation (38 Interior Dec. 157 (1909)), an Indian Department Order relating to selection of school sections (38 Interior Dec. 455 (1910)), and others extending the time for payment by purchasers (48 Interior Dec. 80 (1921); 49 Interior Dec. 131 (1922)).

[29] At the time, a special statute (Act of Feb. 2, 1903, ch. 351, 32 Stat. 793) provided—contrary to *United States* v. *McBratney*, 104 U.S. 621 (1882)—that, regardless of the race of the offender and

the State occasionally filled the void. But prosecutions by either sovereign, then as now, were rare, and, in fact, many civil and criminal matters continued to be handled by tribal and federal authorities within the opened lands. See *Hoxie Report* 100-108, 108-118.[30] In other respects, the United States remained the civilian administrator of the entire original Reservation, including the unsold lands. *Hoxie Report* 71-81, 87-93.

4. In our view, these facts are of secondary relevance. What is dispositive here, it seems to us, is that the opening up experiment in large measure failed, so that today the disputed area retains an important Indian character. As we have said, even though no immediate disestablishment was accomplished by enactment of the 1908 Act, that result might well have later occurred if settlers had, as expected, acquired all, or almost all, the opened lands—as was the case in *Rosebud*. But no such implied diminishment can be found when, as here, the Tribe's title to most of the opened land survived and has been formally "restored" by Interior Department orders.[31]

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the victim, certain enumerated crimes were within federal jurisdiction if committed on any "Indian Reservation" in South Dakota. Accordingly, the court in *La Plant should* have focused on whether the opened area of the Cheyenne River Reservation had been disestablished. In fact, however, the court based its ruling on a finding—erroneous in light of *Ash Sheep*—that Indian title had been extinguished by the 1908 Act as to unsold tracts. See 200 F. at 94-95.

[30] F. Hoxie, *Jurisdiction on the Cheyenne River Indian Reservation: An Analysis of the Causes and Consequences of the Act of May 29, 1908* (undated manuscript) [hereinafter cited as *Hoxie Report*]. This report was part of the record in *United States* v. *Dupris*, *supra*, and was incorporated as part of the record in the instant case, now transmitted to this Court.

[31] The area opened by the 1908 Act comprises approximately 1.6 million acres. By the time of the opening Proclamation of August 19, 1909, almost 400,000 acres in that area had been allotted to tribal members, and some 133,000 acres were subsequently allotted there. *Hoxie Report* 38, 88. After deducting some 90,000 acres for state school sections, this left about 1 million acres open to home-

Indeed, unless the question was irrevocably settled in 1908, it is difficult to attribute to anyone—including the Congress of 1908—an intent to treat as no longer part of the Reservation an area which includes the tribal capital, the Indian Agency and the major Indian town, within which some two-thirds of tribal members reside (outnumbering non-Indians there), and where almost half the acreage is Indian owned. Common sense rebels against that result.

What is more, compelling such a complex pattern, in a case like this one, defeats more recent congressional policy and unnecessarily creates jurisdictional problems. In 1934, implementing the Indian Reorganization Act, the Secretary of the Interior halted all further sales of "opened lands," including those on the Cheyenne River Reservation. See 54 Interior Dec. 559, 561, 563-564 (1934).[32]

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steaders. But it appears that relatively few entries were perfected, in large part because the extravagant promise of the "boosters," having got the settlers in, could not keep them there. See *Hoxie Report* 66-67. The restoration orders, affecting unsold tracts in the opened portion of the Reservation, cover all but one of the 78 townships that are embraced in whole or in part within the opened area. See 6 Fed. Reg. 3300 (1941); 14 Fed. Reg. 471 (1949); 17 Fed. Reg. 1065 (1951); 22 Fed. Reg. 3693 (1957); 30 Fed. Reg. 15588 (1965); 32 Fed. Reg. 14276 (1967). Although the actual acreage of the unsold lands affected by the major "restorations" of 1941 and 1951 (6 Fed. Reg. 3300 and 17 Fed. Reg. 1065) is not given, the detailed exclusion of tracts as small as a sixteenth of a section and individual townsite lots suggests that most of the remaining unallotted land was unsold. But, as on many other Reservations, a large number of allotments fell into non-Indian hands and this accounts for a substantial part of the "fee" holdings now existing in the former opened area. Nevertheless, today, almost half the opened area remains in Indian ownership, all of it, with minor exceptions, in trust or restricted status.

[32] On September 19, 1934, the Secretary of the Interior approved the recommendation of the Commissioner of Indian Affairs, joined by the Commissioner of the General Land Office, that all unsold lands within the opened areas of Indian Reservations be temporarily withdrawn from sale with a view to "restoration" under Section 3 of the IRA—specifically including lands covered by the

Most of the unsold area was "restored" to the Tribe in 1941 (6 Fed. Reg. 3300) and 1951 (17 Fed. Reg. 1065), smaller tracts in other years (14 Fed. Reg. 471 (1949); 22 Fed. Reg. 3693 (1957); 30 Fed. Reg. 15588 (1965); 32 Fed. Reg. 14276 (1957)). As the South Dakota Counties (Br. 46-47 & n.16) are at pains to point out, these orders expressly declared the restored acreage "part of the existing reservation."[33] Thus, it is common ground that much of the disputed area is today not merely "Indian country," but an integral portion of the Cheyenne River Reservation. In light of the congressional decision in 1948 to give like status to allotted and alienated tracts within a Reservation, it is hardly consistent to draw Reservation boundaries in the opened area in "checkerboard" fashion so as to include only restored lands.

1908 Act involved here. 54 Interior Dec. at 561-562, 563. This order was later amended to cover three further opened Reservations and to embrace unsold lots in townsites. *Id.* at 563-564. It is to be noted that, at the time, the Department's view was that restoration orders under Section 3 could only reach lands "usually referred to as surplus lands of Indian reservations." *Id.* at 560. Four years later, to be sure, it was held that lands "cut off" from Reservations, but as to which Indian beneficial title had not been extinguished, were equally subject to restoration under Section 3. 56 Interior Dec. 330, 333 (1938). But that does not impugn the opinion given in 1934 that the Cheyenne River Reservation was not diminished by the 1908 Act. At all events, it is clear that, at all times, the Department viewed "restored" lands as enjoying "Reservation status" thereafter. See 56 Interior Dec. at 333.

[33] Petitioners and those who support them argue that, because restoration orders invoked both Section 3 and Section 7 of the IRA (25 U.S.C. 463, 467), they should be construed as "adding" to the Reservation lands which had previously lost that status. But there is no stronger reason to take that view here than in respect of a similarly worded "restoration," by Act of Congress, in the case of the Colville Reservation. See *Seymour*, 368 U.S. at 356. As previously noted (n.18, *supra*), such orders are ambiguous on the interim status of surplus lands. But no one disputes the validity or effectiveness of those restoration orders as confirming or granting Reservation status to the "restored" lands for the future. See n.32, *supra*.

In our submission, every consideration argues for the obvious alternative: the Cheyenne River Reservation was not immediately diminished in 1908, and, notwithstanding the expectations of all concerned, the opened area survived as part of the Reservation. That solution is both practical and faithful to the intent of Congress. And it follows the Court's rule that only the clearest directive will destroy the protective shield of Indian Reservation status.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 82-1253-CFH
Status: GRANTED

Title: Herman S. Solem, Warden, and Mark V. Meierhenry, Attorney General of South Dakota, Petitioners
v.
John Bartlett

Docketed:
January 25, 1983

Court: United States Court of Appeals for the Eighth Circuit

Counsel for petitioner: Meierhenry,Mark V.

Counsel for respondent: Pechota,Terry L.

Entry	Date	Note	Proceedings and Orders
1	Jan 25 1983	G	Petition for writ of certiorari filed.
2	Feb 24 1983		Brief amicus curiae of Counties of Dewey, et al. filed.
3	Mar 2 1983		DISTPIBUTED. March 18, 1983
4	Mar 4 1983	X	Brief of respondent John Bartlett in opposition filed.
5	Mar 21 1983	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
6	Mar 21 1983		Reply brief of petitioner Solem, Warden, et al. filed.
7	May 4 1983		Brief amicus curiae of United States filed.
8	May 11 1983		DISTRIBUTED. May 26, 1983
9	May 31 1983		Petition GRANTED.
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11	Jul 5 1983		Order extending time to file brief of petitioner on the merits until August 4, 1983.
12	Aug 3 1983		Brief amicus curiae of Minnesota filed.
13	Aug 4 1983		Lodgings received.
14	Aug 6 1983		Brief of petitioners Solem, Warden, et al. filed.
15	Aug 6 1983		Joint appendix filed.
16	Aug 4 1983		Brief amicus curiae of Counties of Dewey, et al. filed.
17	Aug 4 1983		Brief amicus curiae of Counties of Duchesne, et al. filed.
19	Aug 16 1983		Order extending time to file brief of respondent on the merits until October 7, 1983.
20	Aug 19 1983	G	Motion of Dewey County, South Dakota, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
21	Aug 24 1983		Record filed.
22	Aug 24 1983		Certified original record & C..A. proceedings, 9 volumes received.
24	Sep 2 1983		Opposition of respondent Bartlett to motion of Dewey County, S.D., et al. for additional time for argument filed
25	Oct 3 1983		Motion of Dewey County, South Dakota, et al. for leave to participate in oral argument as amici curiae and for divided argument GRANTED. The request for additional time for oral argument is denied.
26	Oct 7 1983		Brief amicus curiae of Cheyenne River Sioux, et al. filed.
27	Oct 7 1983		Brief amicus curiae of United States filed.
28	Oct 11 1983		Brief of respondent John Bartlett filed.
29	Oct 18 1983		CIRCULATED.
30	Oct 24 1983		SET FOR ARGUMENT. Wednesday, December 7, 1983. (4th case) (1 hour)
31	Nov 25 1983	X	Reply brief of petitioners Solem, Warden, et al. filed.

No. 82-1253-CFH

Entry	Date	Note	Proceedings and Orders
32	Dec 7 1983		ARGUED.